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Notes and Comments

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Taxation—North Carolina Income and Property Taxation of Stock in Foreign Corporations.

The 1931 North Carolina Revenue Act imposed a tax of six per cent, without exemptions, on income from stock in foreign corporations, either in cash or stock dividends, received by individuals, fiduciaries, partnerships, or corporations, resident in North Carolina, or by non-resident fiduciaries if held for residents of North Carolina.[1] The tax is imposed as a condition of exemption of such shares of stock from *ad valorem* taxation, and failure to pay this income tax makes the holder of the shares of stock liable for the *ad valorem* tax at the residence of the owner.[2] The act states that the situs of stock owned by residents of this state who have paid the income tax is at the place where the corporation carries on its principal business; but the situs of shares owned by residents who fail to pay this tax is at the residence of the stockholder in North Carolina.[3]

This method of taxing foreign stock was recommended by the 1930 State Tax Commission.[4] It was estimated that the tax would yield a larger sum than was paid when the stock was subjected to *ad valorem* rates, and would be a clear gain in revenue inasmuch as the stock had been completely exempt from *ad valorem* tax since 1923.[5]

An interpretation of the statute involves questions of both state and federal constitutional law. Certainly the General Assembly can

[1] N. C. PUB. LAWS (1931) c. 427, §311½. Holders of stock in foreign corporations domesticated in North Carolina and paying a tax on a proportionate part of their total income are permitted a deduction for such tax.

Since payment of the income tax is a condition precedent to exemption from the property tax, what is the shareholder's position when his stock does not yield any income? Certainly the policy of the act would not then require payment of the property tax.

Another question of construction will be presented when stock is bought between December 31, the date at which income is reckoned, and April 1, the date of listing property. At April 1, no income tax would have been paid on the stock purchased subsequent to December 1, and so the letter of the statute would require it to be listed. However, a satisfactory result might be not to require that the stock be listed, but allow the income to be reported as of next December 31.

[2] N. C. PUB. LAWS (1931) c. 427, §215 (g).

[3] *Supra* note 2.

[4] REPORT OF THE N. C. TAX COMMISSION (1930) p. 29.

[5] Although final figures have not been released, it has been reported that this special income tax has yielded over $500,000.

classify incomes.[6] It would be perfectly valid to provide that incomes from foreign stock shall pay a flat six per cent rate whereas other income shall be taxed at graduated rates. But the present tax is in lieu of a tax on the stock itself. A question arises whether this violates the uniformity clause of the state constitution.[7] An owner of foreign stock pays a six per cent tax on the income therefrom, and he is relieved of a property tax on the stock. However, one who owns other property, say corporate bonds, pays a property tax and in addition he pays on the income from the bonds at a rate depending on the amount of his entire income over the amount legally exempted.[8] In the one case, the owner of stock pays a more onerous income tax;[9] while in the other, the owner of bonds pays an onerous property tax[10] and also pays a normal income tax provided his income exceeds the exemptions. If the uniform rule requires that "everything possessing value as property and the subject of ownership shall be taxed equally . . . ,"[11] it is highly questionable whether the considered statute conforms to that rule. The Tax Commission speaks of a legal right to tax these shares but advises against following "the will o' the wisp of a technical right to tax until we have nothing left but the right to tax and no tax.[12]

The history of corporate stock taxation in North Carolina shows a curious application of the uniform rule. The uniformity clause had its origin in the 1868 Constitution.[13] At that time and from then until 1873 corporate stock was taxed to the owner, unless the corporation paid a tax on its property. The result would be that foreign corporations probably did not pay such a property tax and consequently the proviso enured to the benefit only of holders of domestic stock. From 1873 to 1887 corporate stock was taxed in the hands of

[6] See, Atlantic and Pacific Tea Co. v. Doughton, 196 N. C. 145, 150, 144 S. E. 701, 703 (1928). New Hampshire has said that the income tax rate must be uniform. *In re* Opinion of the Justices, 82 N. H. 561, 138 Atl. 284 (1927).

[7] N. C. CONST., Art. V, §3.

[8] See, N. C. PUB. LAWS (1931) c. 427, §324.

[9] The normal individual income rates are graduated from two per cent to a maximum of six per cent. N. C. PUB. LAWS (1931) c. 427, §310. The corporation rate is a flat five and one-half per cent. N. C. PUB. LAWS (1931) c. 427, §311.

[10] REPORT OF THE N. C. TAX COMMISSION (1930) p. 29, "—failure to report and pay it (the income tax) would constitute liability for the much heavier ad valorem tax."

[11] Kyle v. Fayetteville, 75 N. C. 445, 447 (1876).

[12] REPORT OF THE N. C. TAX COMMISSION (1930) p. 28.

[13] Amendments designed to permit classification of property for taxation have been submitted by the General Assembly, but were defeated at the polls.

the individual shareholder. In 1886 the Tax Commission recommended that the collection be made through the corporation.[14] Accordingly, in the Revenue Act of 1887 the individual owner of shares of corporations taxable in North Carolina was not required to list his shares, but the stock was taxed to the corporation.[15] This policy continued until 1917 when it was extended so as not to require holders of foreign stock to pay a tax on the shares if two thirds of the corporation's property were taxed in North Carolina, and the corporation paid a franchise tax on its entire capital stock.[16] And in 1919 the policy applied to foreign stock was further extended by exempting the stock in the individual's hands if the corporation had assets within this state assessed for taxation at a value exceeding the par value of the total stock owned by citizens of North Carolina, and the corporation paid a franchise tax on its entire capital stock.[17] The result is that except for the period from 1873 to 1887 domestic stock was not taxed in the individual's hands, nor was foreign stock so taxed from 1917 to 1923 if the foreign corporation itself paid sufficient taxes in this state. Notwithstanding the firm disapproval of Chief Justice Clark, this policy, as applied to domestic corporations, was sanctioned in *Person v. Watts*[18] as being entirely consistent with the uniform rule: for it was considered that the shares of stock were actually taxed through the corporation. In 1923 complete exemption was given to stock in foreign corporations without any condition that the corporation own property or pay taxes in this state.[19] As to domestic stock the same conditional exemption of 1887 has continued to the present.

Whatever validity there may be to Judge Clark's position that the stock in the hands of the shareholder is his individual property, distinct from the capital stock of the corporation, and should be taxed although the corporation has paid on its capital stock, in view of the emphatic contrary position taken by the majority, there would seem

[14] REPORT OF THE N. C. TAX COMMISSION (1886) p. 9. "Instead of pursuing the numerous stockholders, who return their shares at varying values, and in some instances make no returns at all, it is much easier to require the corporations to become paymaster for all."

[15] N. C. PUB. LAWS (1887) c. 137, §14.

[16] N. C. PUB. LAWS (1917) c. 231, §4.

[17] N. C. PUB. LAWS (1919) c. 90, §4.

[18] 184 N. C. 499, 115 S. E. 336 (1922). The opinion was written by Judge Adams. Judge Stacy wrote a concurring opinion. Chief Justice Clark wrote a dissenting opinion.

See, Matherly, *Taxation of Stock in North Carolina Corporations* (1923) 1 N. C. L. REV. 203.

[19] N. C. PUB. LAWS (1923) c. 4, §4.

to be little question of the constitutionality of the present method of taxing domestic stock. *Person v. Watts* involved a petition for a writ of mandamus to compel the commissioner of revenue to have listed for taxation as personal property of the shareholders all stock in domestic corporations held by residents of North Carolina. The petition was made upon the ground that the statutory exemption violated the uniformity clause. The writ was denied for the court considered that issuance of mandamus here would be exercising legislative functions. Thus the constitutionality of the exemption was not before the court. However, because of the importance of the question the court expressed its opinion, and said the act was valid. In *Person v. Doughton,*[20] decided one year later, the exemption of foreign stocks was similarly presented. Again mandamus was denied, but constitutionality received only this remark: "Even if the above clause in the Revenue Act of 1923 be unconstitutional—which it does not seem to be, though the question is not before us for decision—still the plaintiffs would not be entitled to the relief demanded, for the judiciary is without power to levy assessments or to devise a scheme of taxation."[21] Economically, and from the viewpoint of the state's revenue, stock in foreign corporations may be in a situation different from domestic stock. The corporation may or may not be taxed in this state depending on whether it does business or owns property within the state. Since foreign stock owned by residents of North Carolina is property taxable in this state,[22] and it may not have the ground for exemption which the court recognized in domestic stock, *i.e.,* that the property has already been taxed in North Carolina through the corporation, the unconditional exemption accorded foreign stock between 1923 and 1931 is thought by some to have contravened the uniform rule. If so, the present tax policy in regard to this stock seems to be only a more lucrative violation of uniformity. Such a result is reached by reasoning along this line: the constitution requires that all property be taxed by a uniform rule. In the case of domestic stock, the property, according to the dictum in *Person v. Watts,* is taxed when the corporation pays a tax on the capital stock. But it may be that foreign corporations do not pay to North Carolina

[20] 186 N. C. 723, 120 S. E. 481 (1923). Opinion by Judge Stacy. Chief Justice Clark again wrote a dissenting opinion.

[21] 186 N. C. 723, 724, 120 S. E. 481, 482 (1923).

[22] Worth v. Commissioners, 82 N. C. 420 (1880). Resident of North Carolina owned stock in a Virginia corporation. *Held,* the stock was taxable in North Carolina. Also, Worth v. Commissioners, 90 N. C. 409 (1884).

a tax on the capital stock, and so the resident holder cannot contend that his interest has been taxed already in this state. Then the constitution would require its taxation here. A contrary view, which seems to have more an economic approach than a legal one, is that the same reasoning that permits exemption of domestic stock in the shareholder's hands must also permit exemption of foreign stock in the shareholder's hands. This view identifies the shares of stock with the corporate property, and says that such identification places the stock in the state where the physical property is located,[23] in many cases the state of incorporation. If the location is North Carolina then the property would be taxed here and the shares exempt, and if the location is outside of North Carolina then the *Person v. Watts* interpretation of the uniformity clause would not, it seems, require the foreign stock to be taxed here. There is nothing in the opinion so to indicate, but this may have been the reasoning behind the dictum in *Person v. Doughton* to the effect that the exemption of foreign stock "does not seem to be" unconstitutional. Though the analysis may satisfy uniformity, it is not, in the case of foreign stock, at all satisfying to the state's revenue. The recipient of the foreign stock income might enjoy the benefits of this state and make only a normal income contribution, while owners of other property might contribute twice, through income and through property taxes. This inequality might be removed, as in the 1931 Act, by requiring of the foreign stock shareholder a heavier income tax contribution. But, to declare that the situs of shares is at the residence of the owner if the income tax is not paid is inconsistent with the theory of indentity with the corporate property which must justify the exemption.

The act taxes income from foreign stock received by residents of North Carolina, and also income received by non-resident fiduciaries if held for residents of this state. This latter provision relative to non-resident fiduciaries introduces a federal constitutional question. For it is axiomatic that a state can tax only persons or things over which it has jurisdiction. If the corpus of the trust is situated outside North Carolina and the trustee is a non-resident, this state can not under *Safe Deposit and Trust Co. v. Virginia*[24] impose a property

[23] *Cf.* Rhode Island Trust Co. v. Doughton, 270 U. S. 69, 46 Sup. Ct. 256, 70 L. ed. 475 (1926).

[24] 280 U. S. 83, 50 Sup. Ct. 59, 74 L. ed. 180 (1929). A resident of Virginia transferred stocks and bonds to a Maryland trust company in trust for his two minor sons. The income was to accumulate and later, along with the principal, to be paid to the sons. The sons remained residents of Virginia. The

tax on the non-resident trustee though the beneficiary lives in this state. And though the trust fund and trustee are without the state a tax on the income received therefrom by a resident beneficiary would be valid under *Maguire v. Trefry*.[25] However, the questioned levy is one on income received not by the resident beneficiary, but by a non-resident trustee and held for a resident beneficiary. The beneficiary pays a tax on the income distributed to him, and the non-resident trustee is taxed only on that part which he does not distribute. The resident beneficiary has an equitable interest in this accumulating income, but this would not seem to justify a tax upon the non-resident trustee.[26] It is believed that, other factors being the same, a distinction between an income tax and a property tax would not distinguish the situation from the *Safe Deposit* case.

Assuming that the income levy on the non-resident trustee were valid, he may yet escape the tax. If he refuses to pay this tax he "shall be liable for the ad valorem tax on such stock at the place of residence of the owner."[27] He is the legal owner, and, since his place of residence is outside of North Carolina, obviously this provision does not reach him.

The statute pays little respect to the minimum income exemptions[28] provided in the state constitution. But in answer to one who insists on his constitutional exemption, the reply might be, you do not have to pay this income tax if you prefer to pay the heavier property tax.

The imposition of full *ad valorem* rates on stock in foreign corporations in addition to the tax levied in the state of incorporation might so greatly lessen the attractiveness of this form of investment that the holders would transfer their investments into non-taxable

trust company held the securities in Maryland and paid taxes levied by that state. Virginia levied a tax upon the corpus of the trust. *Held*, that the property was without the jurisdiction of Virginia.

[25] 253 U. S. 12, 40 Sup. Ct. 417, 64 L. ed. 739 (1920). Trust estate of intangibles held and administered by trustee in Pennsylvania. *Held*, the income received by the beneficiary, a resident of Massachusetts, was taxable by Massachusetts.

[26] See the concurring opinion of Stone, J., in the Safe Deposit case, *supra* note 24, at 95.

[27] N. C. PUB. LAWS (1931) c. 427, §311½.

[28] N. C. CONST., Art. V, §3, requires that "there shall be allowed the following exemptions, to be deducted from the amount of annual incomes, to-wit: for married man with a wife living with him, or for a widow or widower having minor child or children, natural or adopted, not less than $2,000; to all other persons not less than $1,000."

securities.[29] Such is reported to have been a consideration that was persuasive to the General Assembly of 1923 in giving full exemption to foreign stock.[30] In 1930 the Tax Commission advised that this complete exemption created an unfair relationship in taxing policy as between domestic and foreign corporations, and advised the special income tax as a fair policy.[31] Equable taxation and fiscal expediency were deemed to demand that this stock not be taxed at *ad valorem* rates. But the same is true regarding other forms of intangibles. The legal remedy lies in constitutional amendment which will permit comprehensive classification.

E. M. PERKINS.

Workmen's Compensation—Accident Arising Out of and In Course of Employment In North Carolina.*

Few sections of the North Carolina Workmen's Compensation Act[1] have called for such frequent application and construction as §2 (f),[2] which provides that compensable "injury" shall mean only "injury by acident arising out of and in the course of the employment . . ." With a few exceptions, the North Carolina cases have reflected a disposition toward a liberal construction of this section, but not toward the radically liberal attitude adopted by some jurisdictions. In the cases which have arisen under §2 (f), there are many in which the accident clearly either did or did not arise out of and in the course of the employment; these will be appended in footnotes at the appropriate places, and the body of the note will be devoted to a consideration of what are thought to be the more interesting and "border-line" cases.[3]

[29] Possibly only acute analysts of their investments consider the corporation's taxes in deciding where to invest their money. The investor might not look beyond the tax liability of the stock in his own hands.

[30] REPORT OF THE N. C. TAX COMMISSION (1930) p. 28.

[31] REPORT OF THE N. C. TAX COMMISSION (1930) pp. 28, 29; see REPORT OF THE N. C. TAX COMMISSION (1928) 321, at 356. "It is not the exemption of foreign stock *per se* that is objectionable, but the discrimination involved in exempting stock and taxing bonds and other intangibles."

* This note is an attempt to collate the North Carolina cases decided under §2 (f) of the North Carolina Workmen's Compensation Act since the writing of an article entitled *Nine Months of Workmen's Compensation in North Carolina*, by Mr. A. K. Smith, which appeared in 8 N. C. L. REV. 418 (1930).

[1] N. C. CODE ANN. (Michie, 1931) §8081 (h) *et seq.*

[2] N. C. CODE ANN. (Michie, 1931) §8081 (i) (f).

[3] The decisions of both the North Carolina Industrial Commission (either of a single Commissioner or the full Commission) and of the North Carolina Supreme Court are considered. All references to the "Supreme Court" are to the Supreme Court of North Carolina.

The cases are susceptible of division into several categories on the basis of their facts.

Going To and From Work.

The general rule is that an employee is not entitled to compensation for injuries received while going to or from work.[4] In one case, a National Guardsman[5] had been ordered to report to camp. While on the way to the camp in his own car he was fatally injured in a collision. He was entitled to be paid for his services from the time that he left home. The Supreme Court held that the accident did not arise out of and in the course of the decedent's employment.[6]

[4] Cody v. Graham County Board of Education, 1 N. C. I. C. 407 (1930) (teacher slipped on rock in going home from school); Milsaps v. Graham County Board of Education, 1 N. C. I. C. 408 (1930) (teacher injured while returning from home to school district in which he taught); Lyon v. Allen Milling Co., 1 N. C. I. C. 477 (1930) (salesman slipped while filling radiator preparatory to going to work); Beck v. Huntley-Stockton-Hill Co., 2 N. C. I. C. 53 (1930) (clerk injured on way home after doing extra work at store); Pressley v. Woody Brothers' Bakery, 2 N. C. I. C. 87 (1930) (employee injured while cranking truck preparatory to going to work); McCarter v. Osceola Mill, 2 N. C. I. C. 116 (1930) (employee slipped on icy path while on way to work); Moore v. Pine Hall Brick & Pipe Co., 2 N. C. I. C. 162 (1931) (employee injured while on way home after having truck repaired for employer); Osborne v. Rockingham School Board, 2 N. C. I. C. 298 (1931) (teacher fell down steps of teacherage while starting to school); Waters v. Ritter Lumber Co., 3 N. C. I. C. 13 (1931) (employee's feet froze as result of walk home after work through snow); Ellrod v. Southern Desk Co., 3 N. C. I. C. 65 (1931) (employee injured when he stepped from car in front of rooming house); Bray v. W. H. Weatherly & Co., 3 N. C. I. C. 75 (1931) (employee injured while on way to employer's home to get truck in morning).

Note (1917) 12 N. C. C. A. 368 (accidents while on way to or from place of employment); (1931) 8 N. Y. U. L. Q. Rev. 699.

With Waters v. Ritter Lumber Co., *supra, cf.* Brady v. Oregon Lumber Co., 117 Ore. 188, 243 Pac. 96 (1926), rehearing denied, 245 Pac. 732 (1926) (plaintiff, after having been paid off, left logging camp for town; his feet were frozen on the way; compensation denied).

In Thomas v. Carolina Theatre, 1 N. C. I. C. 381 (1930) plaintiff was assistant manager of defendant theatre. After closing the theatre at night, and while on his way home, some highwaymen accosted him and forced him, at the point of a gun, to return to the theatre and open a safe, which the men robbed. After taking the money, one of them hit plaintiff and injured him. *Held,* the injury was compensable.

In Ruffin v. Golden Belt Mfg. Co., 3 N. C. I. C. 17 (1931) decedent was accustomed to go to work about an hour earlier every morning in order to exercise the horses of the president of defendant company. The president, not the company, paid decedent for this. Decedent was killed while riding one of the horses after the time his duties were to begin for defendant company. *Held,* no recovery.

[5] That a National Guardsman is an employee of the state, see Baker v. State, 200 N. C. 232, 156 S. E. 917 (1931); commented on in (1931) 37 W. Va. L. Q. 452.

[6] Hunt v. State, Adjutant General's Department, 201 N. C. 707, 161 S. E. 203 (1931).

It seems arguable that the accident occurred in the course of employment, for the Guardsman was entitled to pay and was proceeding under the direction of his commanding officer at the time that the accident occurred. However, the definition of "course of employment" apparently applied by the court in this case would leave little room for such an argument.[7] Further, even had the court taken the view that the accident occurred in the course of employment, it is probable that the fact that the injury was sustained on the public highway where the decedent was exposed to no greater risk than other travelers,[8] would have a tendency so to weaken the causal connection between the employment and the accident as to result in the holding that the accident did not arise out of the employment.[9]

Special circumstances may take the case out of the general rule that injuries sustained in going to and from work are not compensable. For instance, where, by the contract of employment, plaintiff was to furnish a team and do certain hauling for the employer, an injury which plaintiff sustained from a shying horse while going to work in the morning was held to be compensable, for, as he furnished the team, his employment began when he left home with the team.[10]

But the performance, while on the way to work, of some slight duty incidental to the main employment will not constitute such a circumstance as to suspend the operation of the general rule. Thus, no compensation was allowed an oil truck driver whose duty it was to solicit orders and who was injured while on the way to the place

[7] The court quotes with approval an excerpt from Bohlen, *A Problem in the Drafting of the Workmen's Compensation Acts,* 25 HARV. L. REV. 401, 403, a part of which is as follows: ". . . The place at which the injury is sustained becomes the determining factor among those things which he [the employee] does solely because he is engaged in a particular employment; only those are regarded as in the course of the employment which are done within the master's premises or upon some means of conveyance to or from his place of work which is provided by the master for the sole use of his servants and which the servant is required or entitled to use by virtue of his contract of employment."

[8] And his work as a National Guardsman did not render him peculiarly exposed to dangers of the street or highway, as in the case of a delivery boy who is almost constantly on the street. As to the latter, see Note (1920) 8 A. L. R. 935; Note (1923) 23 A. L. R. 403.

[9] But that the more recent cases give less weight to this doctrine of peculiar exposure to street risks, see Note (1927) 51 A. L. R. 509, 514, 533.

[10] Crawford v. Long, Snider & Codgill, 1 N. C. I. C. 425 (1930). It is to be noticed that in this case the furnishing of the team was an incident of the employment. In the National Guardsman case, *supra* note 6, decedent did not furnish his own car as an incident of his contract of employment as a member of the National Guard.

of the employer carrying an order for gas;[11] nor to a school janitor who had been told by his employer, a few days before, to purchase window cleaning material and who was injured while crossing a street to get the material as he was on his way to work.[12]

Provision by the employer for transportation to or from work must be included in the contract of employment to bring the employee so transported within the protection of the Act; he can not recover for injury sustained during merely accommodatory transportation.[13]

Deviation.

In the following case the injury was by accident that occurred during a deviation, and the question was presented whether the deviation was so material as to preclude recovery. A salesman set out in his car to go to the store of a customer. He departed from the most direct route in order to stop at a drug store and procure tobacco. He testified that he would not have planned to get the tobacco if he had not been going to the customer's store. The total length of his deviation would have been 3500 feet.[14] He was injured while on the way to the drug store and after having deviated from the most direct route to the customer's store. The Supreme Court sustained the claim for compensation, although there was one dissenting opinion.[15]

Where the employee has deviated but has returned to the direct route and is pursuing it at the time of the accident, compensation will be awarded.[16] Plaintiff, a milk truck driver, worked for a dairy located just outside the city. It was his duty to return the truck to the employer's premises after each day's deliveries. One day, after

[11] Dudley v. The Texas Co., 2 N. C. I. C. 308 (1931).

[12] Massey v. Board of Education, 3 N. C. I. C. 26 (1931).

[13] Edwards v. T. A. Loving Co., 3 N. C. I. C. 30 (1931) (decedent was being transported by employer from one place of work to another when killed). See Fox v. Phoenix Mills, 2 N. C. I. C. 261, 263 (1931), reversing 2 N. C. I. C. 149 (1930). Note (1929) 62 A. L. R. 1438; (1931) 8 N. Y. U. L. Q. REV. 699.

[14] Plaintiff lived on the west side of Duke Street, and the customer's store was also located on the west side of Duke Street. But it does not appear how long the direct route would have been.

[15] Parrish v. Armour Co., 200 N. C. 654, 158 S. E. 188 (1931). Stacy, C. J., dissented.

As to injury to a local solicitor, collector, or outside salesman, see Note (1924) 29 A. L. R. 120; Note (1925) 36 A. L. R. 474.

Another deviation case: Jackson v. Western Union Telegraph Co., 2 N. C. I. C. 127 (1930), affirmed by full Commission, 2 N. C. I. C. 175 (1931) (motorcycle messenger boy stopped at motorcycle shop on way back from delivering message and was injured there).

[16] Brown v. Hildebrand, 2 N. C. I. C. 203 (1930); Rogers v. Imperial Life Insurance Co., 2 N. C. I. C. 335 (1931).

making deliveries, he parked the truck in the city for an hour or two while he engaged in personal business and amusement. While driving from the city to the employer's premises, he suffered injury. The Supreme Court allowed recovery.[17]

It is believed that these cases indicated a continuation of the moderately liberal attitude already adopted toward the problem of deviation. The facts of the cases are such that no ground is offered upon which to base an opinion that this attitude has been extended.[18]

Injury On Employer's Premises While Not About Regular Duties.

Where an employee steps aside from his regular duties but is still on the employer's premises when injured, the award of compensation seems contingent largely on the nature and extent of the departure. In one case, plaintiff was a mill worker. The department in which she worked closed at 11:00 o'clock, but all employees were forced to remain on the premises until 11:30 before leaving. During this half-hour period, plaintiff rode on an elevator to the first floor with a friend to see about getting the friend employment. In returning, plaintiff was seriously injured on the elevator. The Supreme Court held that she was entitled to compensation.[19] And where plaintiff "caught up" with his work and went into another department to notify the master mechanic that the plumbing in the house which had been rented to the plaintiff by the employer was defective, and was there injured by a lathe, it was held he could recover.[20] But where the employee, while still on the employer's premises, steps aside and

[17] Jackson v. Dairymen's Creamery, 2 N. C. I. C. 346 (1931), affirmed, 202 N. C. 196, 162 S. E. 359 (1932).

[18] See Smith, *op. cit. supra* prefatory note, at 420.

[19] Bellamy v. Great Falls Mfg. Co., 200 N. C. 676, 156 S. E. 246 (1931). On the authority of this case, compensation was allowed in Britton v. Spofford, 3 N. C. I. C. 103 (1931) (plaintiff employed in card room passed through picker room, stopped to talk a moment with another employee, was injured).

With Bellamy case, *supra, cf.* Taylor v. Hogan Milling Co., 129 Kan. 370, 282 Pac. 729 (1929), 66 A. L. R. 752 (1930) (employee injured while going on elevator from one floor to another, with permission of employer, to pay bill; compensation allowed).

In Johnson v. Provencal Turpentine Co., 125 So. 321 (La. 1929), recovery was denied an employee who was injured on the premises of his employer after the completion of his day's work and while he was performing a favor for the benefit of a third person.

As to injury to an employee engaged in work for the employer (not necessarily on the employer's premises) but outside the scope of his usual duty, see Note (1924) 20 A. L. R. 1335.

[20] Sisk v. Ora Mill Co., 1 N. C. I. C. 320 (1930).

exposes himself to a hazard not related to his sphere of duties, compensation is denied.[21]

Hazardous Employment.

If the nature of the employment is such that the employee is subjected to peculiar hazards, and he is injured by an accident which arises out of his exposure to these hazards, he is entitled to compensation.[22] Thus, where decedent was a night watchman and was attacked while punching the time clock by an unknown assailant, it was held by the Supreme Court that the accident arose out of and in the course of decedent's employment.[23] In another case, decedent was a boiler fireman who was required to be at the employer's planing mill at 5:30 each morning. Near the mill were a well traveled highway and a railroad; consequently, many tramps and "hitch-hikers" passed by. Decedent was murdered and robbed by an unknown party after he had gone to work. The Supreme Court sustained his claim.[24]

Injury From Practice Which Is Tolerated By Employer.

In some of the cases, where the employer knew of some incidental practice resorted to by the employees while about their work, and raised no objection to it, the employee injured while following this practice successfully asserted that the accident arose out of and in the course of the employment. For example, the employer knew of

[21] Piercy v. Henrietta Mills, 2 N. C. I. C. 28 (1930) (plaintiff left usual employment, went to rear of building, had lunch; on way back, while passing a bobbin cleaning machine, he let the lid down and was injured); McCarter v. Thomas Hosiery Mills, 2 N. C. I. C. 329 (1931) (during lunch hour plaintiff went to another part of the premises, not by the well lighted and customary way, but along a little used way, and claims he fell into oil pit and was injured; compensation was denied, but conceivably, might have been awarded if there had been sufficient evidence of acquiescence on the part of the employer in the use of the hazardous way: see *infra* notes 25 and 26); Query v. Glasgow-Allison Co., 3 N. C. I. C. 63 (1931) (plaintiff parked his private car in alley in such a way that it interfered with passage of truck; went to move it, was injured).

In Burris v. Southern Mfg. Co., 1 N. C. I. C. 423 (1930), plaintiff left premises, walked across railroad tracks without employer's knowledge or consent, and in absence of emergency. On way back, she claims she slipped on the railroad tracks. *Held,* the injury was not compensable.

[22] Copper v. Rowan Cotton Mills Co., 2 N. C. I. C. 133 (1930) (plaintiff was master mechanic subject to call at all times for purpose of keeping plant operating efficiently, and had to cross congested highway frequently); Stanland v. Wilmington Terminal Warehouse Co., 2 N. C. I. C. 331 (1931) (decedent, night watchman, attacked while guarding employer's warehouse).

[23] West v. East Coast Fertilizer Co., 2 N. C. I. C. 209 (1931), affirmed, 201 N. C. 556, 160 S. E. 765 (1931). As to injuries to watchman generally, see Note (1920) 6 A. L. R. 578; Note (1921) 13 A. L. R. 512.

[24] Goodwin v. Bright, 3 N. C. I. C. 9 (1931), affirmed, 202 N. C. 481 (1932).

the custom of the employees to go to the "hot water hole," where steam was condensed into water, to get water for their own automobiles. Plaintiff was a fireman whose duty required that he go to the hole twice each night to let water in the boiler. He fell into the water and was burned, however, while attempting to get water for his car. Compensation was given.[25] And where the employer knew of and tolerated horse-play among the employees, an injury received by plaintiff as a result of another employee stepping on his foot and pushing him while they were standing in line preparatory to checking out, was held compensable.[26]

Other Cases.

A newspaper employee was injured while playing on a baseball team composed only of employees of the paper, in a game against a team purporting to represent another newspaper in the same city.[27] Plaintiff recovered. But in a later case, an injury received by a mill employee while playing on a baseball team composed of employees of the mill, was held not to be compensable.[28] In both cases, participation by employees seems to have been voluntary; equipment was furnished by the respective employers; conceivably both employers received an indirect benefit from the recreational effect upon the morale of the employees. In the latter case, on the day of the game, all the employees were released about 4:00 P.M., and were made a gift of their wages for the remainder of the working day; whether this was so in the former case does not appear. In the former case the employer might have anticipated some benefit from the successful competition of the team with that of the other newspaper; no such element appears in the latter case. However, it is believed that any distinction between the cases is tenuous, and that the latter case, in denying compensation, reaches the more logical result.[29] But par-

[25] Tucker v. Paola Cotton Mills, 1 N. C. I. C. 395 (1930).

[26] Wilkie v. American Enka Corp., 3 N. C. I. C. 44 (1931). See Chambers v. Union Oil Co., 1 N. C. I. C. 221, 224, affirmed, 199 N. C. 28, 31, 153 S. E. 594, 596 (1930) (plaintiff, while filling an oil truck driven by him, was injured by the accidental discharge of a pistol carried by a fellow truck driver; there was some evidence of acquiescence by the employer in the habit of employees in carrying weapons); Christopher v. Shuford Mill Co., 1 N. C. I. C. 420 (1930), affirmed by full Commission in 1 N. C. I. C. 483 (1930) (evidence of acquiescence in plaintiff's operation of the machine at which he was injured).

[27] Bates v. Raleigh *Times*, 1 N. C. I. C. 433 (1930).

[28] Benson v. Nebel Knitting Mills, 3 N. C. I. C. 105 (1931).

[29] With these two cases, *cf.* Ryan v. State Industrial Commission, 128 Okla. 25, 261 Pac. 181 (1927): plaintiff was employed by public utilities company as meter reader, but evidence tended to show that he was hired primarily because

ticipation in play may be so closely related to the employment as clearly to become a part of it. For example, where plaintiff worked for the proprietor of a bowling alley, and it was plaintiff's duty to bowl with customers of the alley in order to stimulate business, an injury received while bowling was held compensable.[30]

In another case, plaintiff was a hotel clerk. While about his duties, he witnessed a woman register at the hotel with a man not her husband. The husband subsequently brought an action for divorce, and his attorney informed plaintiff's employer that he had a subpoena for plaintiff, who was wanted as witness, but that if the employer saw that plaintiff was present at the trial, he would not have the subpoena served. Plaintiff went to the place of trial with his employer in the latter's car. On their way back, he was injured when the car was wrecked.[31] Plaintiff's claim was sustained. Such a result could be reached only by a very liberal construction of §2 (f).[32]

he was a good ball player, and the company indirectly maintained a team to compete with those of other companies. Plaintiff sustained an injury while practicing with the team near the place of employment during the lunch hour. *Held,* if the injury occurred in the course of the employment, it did not arise out of it; compensation denied.

[30] Dixon v. Parrish, 2 N. C. I. C. 375 (1931).

[31] Beal v. Cobb-Latta Hotel Co., 2 N. C. I. C. 100 (1930).

[32] The employer was not a party to the suit. If he had been, the case would, of course, have been a much stronger one for allowing compensation.

Additional cases:

In the following cases, the accident was held to have arisen out of and in the course of the employment: Wheeler v. City Ice & Fuel Co., 1 N. C. I. C. 363 (1930) (plaintiff injured while on trip for employer); Peoples v. Warrenton Box & Lumber Co., 1 N. C. I. C. 507 (1930) (plaintiff had been indulging in horse-play but had abandoned it when injured); Wineberry v. Farley Stores, Inc., 2 N. C. I. C. 64 (1930) (decedent met accident while attempting to make collections for employer); Buchanan v. Parker-Graham-Sexton, Inc., 202 N. C. 176, 162 S. E. 223 (1931) (employee killed by gas poisoning; as to injury from fumes as accident or occupational disease, see Note (1920) 6 A. L. R. 1466; Note (1923) 23 A. L. R. 335).

Accident not arising out of and in the course of the employment: Stewart v. Curtis-Wright Flying Service, 2 N. C. I. C. 13 (1930) (airplane pilot injured while "hopping" passenger for own profit); Whitley v. North Carolina Highway Commission, 1 N. C. I. C. 393 (1930), affirmed, 201 N. C. 539, 160 S. E. 827 (1931) (plaintiff injured by shot from hunter while repairing highway truck; *cf.* Boris Const. Co. v. Haywood, 214 Ala. 162, 106 So. 799 (1925), rehearing denied (1926): decedent accidentally shot by small boy shooting at sparrows while decedent was in course of employment; compensation awarded); Booth v. Scott Coal Co., 2 N. C. I. C. 323 (1931) (coal truck driver injured while apparently using truck after working hours for personal motives); Sealey v. American Enka Corp., 2 N. C. I. C. 328 (1931) (plaintiff injured after he had seized fellow employee and threatened him with knife); Davis v. North State Veneer Corp., 200 N. C. 263, 156 S. E. 859 (1931) (plaintiff injured while performing voluntary errand for employer); Boyette v. Thompson-Wooten Oil Co., 2 N. C. I. C. 378 (1931) (evidence that plaintiff was injured by con-

Although the case goes far in allowing compensation, it may perhaps be justified on the ground that the employer apparently undertook to see that plaintiff was present at the trial.

W. J. ADAMS, JR.

Banks and Banking—Deposit for Specific Purpose as Preferred Claim.

A bank received a deposit under an escrow agreement to be paid to a third party subject to an arbitration. The bank having failed pending the arbitration proceeding, it was held that the sum was a deposit for a specific purpose, creating a trust relationship, and the beneficiaries were entitled to a preferred claim to the funds in the hands of the receiver.[1]

Bank deposits may be classified as either general, special, or deposits for a specific purpose.[2] The ordinary deposit is general, creating a debtor-creditor relationship between the depositor and the bank.[3] Upon failure of a bank containing such deposits, the general depositor is not entitled to any preference over the creditors of the bank, but shares *pro rata* with them.[4] A special or segregated deposit arises where it is agreed that the thing deposited shall be safely kept,

vulsion); Hemmingway v. Atlas Plywood Corp., 2 N. C. I. C. 269 (1931) (plaintiff caught pneumonia while working in hole).

Where the cause of accident was entirely unrelated to the employment: Honeycutt v. Vann Motor Co., 1 N. C. I. C. 510 (1930) (plaintiff injured while trying to skate); Canter v. Surry County Board of Education, 1 N. C. I. C. 414 (1930) (school janitor injured on premises by shotgun he was carrying for purpose of killing squirrel); Plyler v. Indian Trail School, 2 N. C. I. C. 343 (1931) (teacher made sick by food furnished at teacherage where she boarded); Vann v. Goldston School Board of Education, 2 N. C. I. C. 361 (1931) (decedent was school teacher; became sick at school and sent to principal for aromatic spirits of ammonia; was sent poison ammonia, which she drank); Bodenheimer v. Ragan Knitting Co., 3 N. C. I. C. 95 (1931) (plaintiff bitten while at work by mad dog, owner unknown).

[1] Parker v. Central Bank and Trust Co. of Asheville, 202 N. C. 230, 162 S. E. 564 (1932).

[2] Corporation Commission of N. C. v. Merchants' Bank & Trust Co., 193 N. C. 696, 138 S. E. 24 (1927); 1 BOLLES, MODERN LAW OF BANKING (1907) 432.

[3] Corporation Commission of N. C. v. Merchants' Bank & Trust Co., 194 N. C. 125, 138 S. E. 530, 57 A. L. R. 382 (1927); Northwest Lumber Co. v. Scandinavian-American Bank, 130 Wash. 38, 225 Pac. 825 (1924); 1 BOLLES, *op. cit. supra* note 2. In the absence of an agreement to the contrary, a deposit is presumed to be general. Washington Shoe Mfg. Co. v. Duke, 126 Wash. 510, 218 Pac. 232, 37 A. L. R. 611 (1923); Lawrence v. Lincoln County Trust Co., 125 Me. 150, 131 Atl. 863 (1926).

[4] McClain v. Wallace, 103 Ind. 562, 5 N. E. 911 (1885); Schmelling v. State, 57 Neb. 562, 78 N. W. 279 (1899); Bank of Blackwell v. Dean, 9 Okla. 626, 60 Pac. 226 (1900).

and that identical thing returned to the depositor.[5] Here the relationship is one of bailor and bailee, rather than one of debtor and creditor, the depositor retaining title to the specific *res* deposited, which he can reclaim, or if mingled with other funds, can recover as a preferred claim.[6] A deposit for a specific purpose is where money or property is delivered to the bank to be applied to a designated object.[7] Here the deposit becomes impressed with a trust, and in case the bank fails the depositor is entitled to priority in payment.[8] Many courts have tended to confuse specific deposits with special deposits,[9] and although the result reached is the same, it seems better that they be distinctly classified.

In order to create a deposit for a specific purpose both the depositor and the bank must understand that the money is to be used for that purpose and no other.[10] The intention of the depositor must be clearly expressed, and in determining that intention the previous course of dealing of the parties may be important.[11] Generally, deposits to meet payments on a mortgage,[12] or note,[13] or to meet des-

[5] Corporation Commission of N. C. v. Merchants' Bank & Trust Co., *supra* note 2; 1 MORSE, BANKS & BANKING (6th ed. 1928) §183.

[6] Fogg v. Tyler, 109 Me. 109, 82 Atl. 1008, 39 L. R. A. (N. S.) 847 (1912); Leach v. Capper, 202 Iowa 887, 211 N. W. 532 (1926).

[7] Corporation Commission of N. C. v. Merchants' Bank & Trust Co., *supra* note 2; 1 MORSE, *op. cit. supra* note 5, §185.

[8] Bergstresser v. Lodewick, 59 N. Y. Supp. 630 (1899); Sawyer v. Conner, 114 Miss. 363, 75 So. 131 (1917); Central Bank & Trust Co. v. Ritchie, 120 Wash. 160, 206 Pac. 926 (1922); Williams v. Bennett, 158 Ga. 488, 123 S. E. 683 (1924); Corporation Commission of N. C. v. Merchants' Bank & Trust Co., *supra* note 3.

[9] Moreland v. Brown, 86 Fed. 257 (C. C. A. 9th, 1898); Decatur First Nat. Bank v. Henry, 159 Ala. 367, 49 So. 97 (1905); People v. City Bank of Rochester, 96 N. Y. 32 (1884); Craig v. Bank of Granby, 210 Mo. App. 334, 238 S. W. 507 (1922).

[10] Northern Sugar Corp. v. Thompson, 13 F. (2d) 829 (C. C. A. 8th, 1926); Craig v. Bank of Granby, *supra* note 9; Fralick v. Coer D'aline Bank & Trust Co., 36 Idaho 108, 210 Pac. 586 (1922); Central Coal & Coke Co. v. State Bank of Bevier, 44 S. W. (2d) 188 (Mo. 1931).

[11] *Supra* note 10. However, it seems that departmental accounts of corporations, or household expense accounts, would not be classified as specific, as these are more in the nature of book-keeping devices than deposits for specifically designated objects. See Northern Sugar Corporation v. Thompson, *supra* note 10, at 832.

[12] Blummer v. Scandinavian-Am. State Bank of Badger, 169 Minn. 194, 210 N. W. 865 (1926).

[13] Bergstresser v. Lodewick; Central Bank & Trust Co. v. Ritchie, both *supra* note 8.

ignated outstanding checks,[14] or to further some particular project[15] have been held to be for a specific purpose.

However, in order for the deposit to be allowed as a preferred claim, the depositor must not only prove that a trust relationship existed, but must show that the fund came into the receiver's hands.[16] It is not enough to show that the book assets of the bank were increased, or that the money received by the bank was used in reducing its indebtedness.[17] It must be shown that the funds which came into the hands of the receiver were augmented by the particular deposit.[18] However, where trust funds have been wrongfully mingled with other assets of the bank, the familiar "first in, first out" rule does not apply, but there is a presumption that the fund was retained in custody, and came into the receiver's hands.[19]

The allowance or disallowance of a deposit as a trust fund has occasioned considerable difficulty. It has been uniformly held that a general deposit of trust funds by a trustee rightfully made will not constitute a trust deposit.[20] If the trust funds are wrongfully de-

[14] Corporation Commission of N. C. v. Merchants' Bank & Trust Co., *supra* note 3; Southern Exchange Bank v. Pope, 152 Ga. 162, 108 S. E. 551 (1921); Morton v. Woolery, 48 N. D. 1132, 189 N. W. 232, 24 A. L. R. 1107 (1922).

[15] Sawyer v. Conner; Williams v. Bennett, both *supra* note 8; Secrest v. Ladd, 112 Kan. 23, 209 Pac. 824 (1922); First. Nat. Bank of Ranger v. Price, 262 S. W. 797 (Tex. 1924).

[16] Empire State Surety Co. v. Carroll County, 194 Fed. 593 (C. C. A. 8th, 1912); Poisson v. Williams, 15 F. (2d) 582 (E. D. N. C. 1926); Commissioners v. Wilkinson, 119 Mich. 655, 78 N. W. 893 (1894); Homer v. Hanover State Bank, 114 Kan. 123, 216 Pac. 822 (1923); Chetoga State Bank v. Farmers and Merchants' State Bank, 114 Kan. 463, 218 Pac. 1000 (1923); Note (1923) 26 A. L. R. 3

[17] First. Nat. Bank of Ventura v. Williams, 15 F. (2d) 585 (E. D. N. C. 1926); Daughtry v. International Bank of Commerce, 18 N. M. 119, 134 Pac. 220 (1913); Empire State Surety Co. v. Carroll County; Homer v. Hanover State Bank, both *supra* note 16.

[18] *Supra* note 16.

[19] Central Nat. Bank v. Conn. Mutual Life Ins. Co., 104 U. S. 54, 26 L. ed. 693 (1881); Poisson v. Williams, *supra* note 16; Sherwood v. Central Mich. Savings Bank, 103 Mich. 109, 61 N. W. 352 (1894).

[20] Wetherell v. O'Brien, 140 Ill. 146, 29 N. E. 904, 33 Am. St. Rep. 221 (1892); Officer v. Officer, 120 Iowa 389, 90 N. W. 947, 98 Am. St. Rep. 365 (1903); Thompson v. Orchard State Bank, 76 Colo. 20, 227 Pac. 827, 37 A. L. R. 115 (1924); Note (1924) 37 A. L. R. 120.

So, where the bank as fiduciary deposits money in its own commercial department, no preference is given. First & Citizens' Nat. Bank v. Corp. Comm. of N. C., 201 N. C. 381, 160 S. E. 360 (1931); Commonwealth v. Tradesmen's Trust Co., 250 Pa. 378, 95 Atl. 577 (1915); Wainwright Trust Co. v. Dulin, 67 Ind. App. 476, 119 N. E. 387 (1918); Notes (1928) 56 A. L. R. 806; (1930) 16 VA. L. REV. 392, 396; (1930) 44 HARV. L. REV. 281. In New England the practice seems to be to carry such fiduciary deposits in another bank (Letter Jan. 8, 1932 from Old Colony Trust Co., Boston) and such practice may also be required by law. MASS. GEN. LAWS (1921) c. 172, §54. Statutes may also

posited and the bank has knowledge of the trust character of the funds, the bank will be held to have taken the property in trust.[21] Many courts have adopted the view that the state has a preference, by virtue of its prerogative rights derived from the common law, to public funds deposited in a bank.[22] Other courts, perhaps the minority, hold that no such prerogative right exists, and the state is not entitled to a preference in the absence of a statute.[23] This prerogative right has been generally held not to apply to counties and other political subdivisions.[24] Where public funds are wrongfully received by a bank not authorized to accept public money, the bank is held to be a trustee *ex maleficio,* and the owner is entitled to a preference.[25] So, if a bank receives deposits when it is hopelessly insolvent within the knowledge of its officers, the bank is deemed to be a trustee *ex maleficio.*[26]

give a preference expressly or by judicial interpretation. Glidden v. Gutelius, 96 Fla. 834, 119 So. 140 (1928); *In re* American Savings Bank of Marengo, 210 Iowa 568, 231 N. W. 311 (1930); Myers v. Matusek, 98 Fla. 1126, 125 So. 360 (1929). The North Carolina Commissioner of Banks now requires security to be set aside for such deposits. Rule No. 4, (1931) 10 TAR HEEL BANKER 46. However, no constant exact check can be kept as compared with the amount of trust funds. See also 12 U. S. C. A., §248 (k) (1927).

[21] *In re* Knapp, 101 Iowa 488, 70 N. W. 626 (1897); Reeves v. Pierce, 64 Kan. 502, 67 Pac. 1108 (1902); State v. American State Bank, 108 Neb. 111, 187 N. W. 762 (1922). The reason assigned is that since the trustee has no authority to deposit the money, its character when deposited, is preserved in the interest of the *cestui que trust.*

[22] *In re* Carnegie Trust Co., 206 N. Y. 390, 99 N. E. 1096 (1912); Woodyard v. Sayre, 90 W. Va. 295, 110 S. E. 689 (1922); U. S. Fidelity & Guaranty Co. v. Bramwell, 108 Ore. 26, 217 Pac. 332, 32 A. L. R. 829 (1923); Maryland Casualty Co. v. McConnell, 148 Tenn. 656, 257 S. W. 410 (1924). The state having succeeded under the common law to certain of the prerogatives belonging to the king, it is entitled to a preference over general creditors of a closed bank.

[23] State v. Lowdermilk, 23 Ariz. 574, 205 Pac. 915 (1922); Hammons v. U. S. Fidelity & Guaranty Co., 30 Ariz. 480, 248 Pac. 1086 (1926); Maryland Casualty Co. v. Rainwater, 173 Ark. 103, 291 S. W. 1003 (1927); N. C. Corp. Comm. v. Citizens' Bank & Trust Co., 193 N. C. 513, 137 S. E. 587, 51 A. L. R. 1350 (1927).

[24] Aetna Casualty & Surety Co. v. Bramwell, 12 F. (2d) 307 (D. Ore. 1926); Calhoun County v. Matthews, 99 W. Va. 483, 129 S. E. 399 (1925); Glynn County v. Brunswick Terminal Co., 101 Ga. 244, 28 S. E. 604 (1897); U. S. Fidelity & Guaranty Co. v. Rainey, 120 Tenn. 357, 113 S. W. 397 (1908). Counties being merely subdivisions of the state, are not sovereign, and have no sovereign rights of preference. But see Denver v. Stenger, 295 F. 809 (C. C. A. 8th, 1924).

[25] Allen v. U. S., 285 F. 678 (C. C. A. 1st, 1923); Grand Forks County v. Baird, 54 N. D. 315, 209 N. W. 782 (1926); Lunenburg County v. Prince Edward-Lunenburg County Bank, 138 Va. 33, 121 S. E. 903 (1924); Jarvis v. Hammons, 32 Ariz. 444, 259 Pac. 886 (1927). The act of a bank not a public depositary in receiving the deposit is fraudulent, and the depositor may rescind the transaction and recover his deposit.

[26] St. Louis & San Francisco Ry. Co. v. Johnston, 133 U. S. 566, 10 Sup. Ct. 390, 33 L. ed. 683 (1890); Richardson v. New Orleans Debenture Co., 102 F.

The deposit in the instant case falls clearly within the classification of a deposit for a specific purpose. Such deposits under escrow agreements have generally been held to be specific.[27] The intention in such cases seems clear that the ordinary debtor-creditor relationship is not contemplated. Thus, it seems right that the depositor should be preferred above the general creditors of the bank.

ROBERT A. HOVIS.

Bribery—Scope of Official Duties Under Bribery Statute.

Defendant, clerk of the city council, was convicted of bribery under an indictment alleging that he exerted his influence upon members of the council to procure the passage of resolutions settling a claim against the city and that he stamped, transmitted and certified these resolutions. The question presented was whether or not defendant's lobbying of the councilmen was within the scope of his official duties.[1] *Held,* the indictment sufficiently related to the clerk's official duties and his conviction was proper.[2]

At common law, bribery consisted in the receiving or offering of any undue reward by or to any person in a public office to influence his behavior in office.[3] Modern statutory definitions[4] of the offense[5]

780 (C. C. A. 5th, 1900); Willoughby v. Weinberger, 15 Okla. 226, 79 Pac. 777 (1905); Orme v. Baker, 74 Ohio St. 337, 78 N. E. 439, 113 Am. St. Rep. 968 (1906).

There is a split of authority concerning the allowance of a preference where the failed bank has issued a draft covering money on deposit. Morecock v. Hood, 202 N. C. 321, 162 S. E. 730 (1932) (no preference allowed); Bryon v. Coconut Grove Bank and Trust Co., 132 So. 481 (Fla. 1931) (preference allowed). The better view seems to be not to allow a preference. Note (1932) 26 ILL. L. REV. 63.

As to whether the proceeds of a check or other paper deposited with a bank for collection constitutes a trust fund in the hands of a bank which has failed, see Bogert, *Failed Banks, Collection Items, and Trust Preference* (1931) 29 MICH. L. REV. 545; Turner, *Bank Collections—The Direct Routing Practice* (1929) 39 YALE L. J. 468.

[27] Hudspeth v. Union & Savings Bank, 196 Iowa 706, 195 N. W. 378, 31 A. L. R. 466 (1923); Schulz v. Bank of Harrisonville, 246 S. W. 614 (Mo. 1923); Mothersead v. Lewis, 117 Okla. 167, 245 Pac. 550 (1925); Lusk Development and Improvement Co. v. Giinter, 32 Wyo. 294, 232 Pac. 518 (1925); Blythe v. Kujawa, 175 Minn. 88, 220 N. W. 168 (1928).

[1] As to defendant clerk's prescribed duties, see Taylor v. State, 161 S. E. 793, 794 (Ga. 1932).

[2] Taylor v. State, *supra* note 1.

[3] State v. Farris, 229 S. W. 1100 (Mo. App. 1921); People v. Coffey, 161 Cal. 433, 119 Pac. 901 (1911); State v. Pritchard, 107 N. C. 921, 12 S. E. 50 (1890); 3 WHARTON, CRIMINAL LAW (11th ed. 1912) 2352.

[4] For a general discussion, see 9 C. J. 406.

[5] As to the North Carolina statute, see N. C. CODE ANN. (Michie, 1931) §4372.

include all persons whose official conduct is in any way connected with the administration of government,[6] general or local,[7] whether judicial,[8] legislative,[9] executive[10] or ministerial.[11] The New York statute includes any person employed by or acting for the state, or for any public officer in the business of the state.[12] A clerk of a city council is an "officer of the state" and as such may be guilty of bribery.[13]

Generally,[14] the cases say that the object sought by the bribe[15] must be an act within the scope of authority or within the official duties of the officer bribed.[16] Nevertheless, a number of courts hold officials who have acted outside the scope of their authority when they have been acting under color of office.[17] A broad construction of the statutory definitions of bribery covers the case where a public officer acts corruptly in a matter to which he merely bears some official

[6] Dropps v. U. S., 34 F. (2d) 15 (C. C. A. 8th, 1929).
[7] Fromm v. State, 36 Ohio App. 346, 173 N. E. 201 (1930).
[8] People v. Jackson, 191 N. Y. 293, 84 N. E. 65, 15 L. R. A. (N. S.) 1173, 14 Ann. Cas. 243 (1908).
[9] People v. Emmons, 7 Cal. App. 685, 95 Pac. 1032 (1908).
[10] State v. Worsham, 154 Wash. 575, 283 Pac. 167 (1929); Territory v. Wong, 30 Haw. 819 (1929).
[11] Osburn v. State, 160 Tenn. 594, 28 S. W. (2d) 47 (1930).
[12] N. Y. CONSOL. LAWS, PENAL LAW (1930) §372; People v. Clougher, 246 N. Y. 106, 158 N. E. 38 (1927).
[13] Taylor v. State, 42 Ga. App. 443, 156 S. E. 623 (1931) (facts same as in instant case, but indictment held defective); White v. State, 43 Ga. App. 748, 159 S. E. 897 (1931) (private individual who aided, counseled and conspired with city councilman held guilty of bribery).
[14] As to intent of offeror and acceptor of bribe: (1931) 25 ILL. L. REV. 456; Robinson v. U. S., 32 F. (2d) 505 (C. C. A. 8th, 1928); Williams v. State, 100 Tex. Cr. Rep. 318, 272 S. W. 484 (1925); Williams v. State, 178 Wis. 78, 189 N. W. 268 (1922). As to knowledge by accused of official character of officer bribed: State v. Beattie, 129 Me. 229, 151 Atl. 427 (1930). Such knowledge may be by implication. Creswell v. State, 161 Tenn. 290, 30 S. W. (2d) 247 (1930). Failure to convict offeror does not entitle acceptor of bribe to directed verdict of acquittal. People v. Frye, 248 Mich. 678, 227 N. W. 748 (1929). It is not bribery where the official act is consummated without prior corrupt intent. People v. Coffey, *supra* note 3.
[15] Actual tender of bribe is not necessary. Fenwick v. State, 200 Ind. 460, 164 N. E. 632 (1929); People v. Anderson, 75 Cal. App. 365, 242 Pac. 906 (1926).
[16] Taylor v. State, *supra* note 13, State v. Adcox, 312 Mo. 55, 278 S. W. 990 (1925); State v. Adams, 308 Mo. 664, 274 S. W. 21 (1925).
[17] Fall v. U. S., 49 F. (2d) 506 (App. D. C. 1931) (defendant assumed authority to proceed with the administration of the petroleum reserves); People v. Clougher, *supra* note 12 (secretary to health commissioner caused assistant secretary to procure commissioner's approval of a temporary cream permit); People v. Anderson, *supra* note 15 (city marshal had no authority to arrest); Browne v. U. S., 290 Fed. 870 (C. C. A. 6th, 1923) (defendant army officer could not make valid sales of war materials); People v. Jackson, *supra* note 8 (coroner assumed to act judicially where he was without jurisdiction).

relation, though the act be technically beyond the scope of his official duties.[18] Similarly, where the conduct of the officer bribed relates to acts purely discretionary by virtue of his actual relation to an official matter. [19] The act need not be prescribed by statute,[20] but may be established by usage.[21] It is immaterial whether the act be right or wrong, where official in form and done under color of office.[22] And it is not essential that the act be accomplished.[23]

The strict official duties of the defendant in the instant case consisted in his stamping, transmitting and certifying the resolutions.[24] The majority opinion brought defendant's lobbying of the councilmen within the scope of his official duties on the ground that defendant intended such acts, coupled with his ministerial duties, to accomplish one general result.[25] The dissenting opinion contended that defendant was bribed merely for his political influence, that his services as clerk were not needed and the fact that he happened to be clerk was but a coincidence.[26] It is submitted that the decision in the instant case is in line with the judicial authorities which bring within the statutory definitions of bribery any act related to the official duties of a public officer and that, as a matter of public policy to protect taxpayers from unscrupulous officials,[27] the court was justified in holding defendant's acts within the scope of his official duties.

A. E. GARRETT, JR.

[18] People v. Lafaro, 250 N. Y. 336, 165 N. E. 518 (1929); People v. Clougher, *supra* note 12.

[19] People v. Walsh, 138 Misc. 159, 246 N. Y. Supp. 171 (1930); People v. Clougher, *supra* note 12.

[20] Daniels v. U. S., 17 F. (2d) 339 (C. C. A. 9th, 1927); U. S. v. Birdsall, 233 U. S. 223, 34 Sup. Ct. 512, 58 L. ed. 930 (1913).

[21] U. S. v. Birdsall, *supra* note 20.

[22] People v. Walsh, *supra* note 19 (defendant chairman of board of standards and appeals voted in favor of a legal resolution); Daniels v. U. S., *supra* note 20 (defendant bribed prohibition agent to forego investigation of withdrawals of bonded liquor); People v. Jackson, *supra* note 8 (coroner acted without jurisdiction); Turner v. State, 43 Ga. App. 799, 160 S. E. 509 (1931) (matter not legally pending before city council). Vote of councilman need not be upon enforceable measure. York v. State, 42 Ga. App. 439, 156 S. E. 733 (1931). As to defective appointment of officer: State v. Wynne, 118 N. C. 1206, 24 S. E. 216 (1896).

[23] Curtis v. State, 113 Ohio St. 187, 148 N. E. 834 (1925).

[24] Taylor v. State, *supra* note 1, at 794.

[25] Taylor v. State, *supra* note 1, at 803.

[26] Taylor v. State, *supra* note 1, at 806.

[27] Fromm v. State, *supra* note 7, at 204.

Conditional Sales—Registration—Effect on Vendor in Possession.

The vendee executed a conditional sale contract for an automobile on January 16, the car to be retained by the vendor until a down payment was made and vendee's old car turned in as a part of the purchase price. The vendee continued to use his old car. On the same day the vendee executed and recorded a chattel mortgage on the car to plaintiff. No reference is made in the reported case to the registration of the conditional sale contract.[1] The money was handed over on the chattel mortgage on January 18. Down payment and delivery of the car under the conditional sale were also made on that day. *Held,* the chattel mortgage takes priority over the conditional sale contract.[2]

To prevent a conditional sale vendee from obtaining credit on the appearance of title to goods in his possession, to which the common law recognized the title of the vendor,[3] a statute[4] was passed requiring a conditional sale to be recorded as if it were a chattel mortgage.[5]

Two different situations existed in the instant case which should be considered in determining the applicability of the statute. On the 16th, the date the chattel mortgage was executed and recorded, the car was in the possession of the vendor, and there was no appearance of title in the vendee. On the 18th the delivery of possession of the car to the vendee created the appearance of title by reason of which the money may have been handed over on the chattel mortgage. But since a chattel mortgage takes effect from the date of registration,[6]

[1] From information gained *dehors* the reported case it was learned that the conditional sale contract was never recorded.

[2] Jordan v. Wetmur, 202 N. C. 279, 162 S. E. 610 (1932).

[3] Brown Carriage Co. v. Dowd, 155 N. C. 307, 71 S. E. 721 (1911); JONES, CHATTEL MORTGAGES (5th ed. 1908) §276; 1 WILLISTON, SALES (2d ed. 1924) §324.

[4] N. C. CODE ANN. (Michie, 1931) §3312; §3311 requiring the recordation of a chattel mortgage reads in part: "No deed of trust or mortgage for real or personal estate shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration from the . . . mortgagor, but from the registration of such deed of trust or mortgage. . . ."

[5] See Empire Drill Co. v. Allison, 94 N. C. 548, 553 (1886) (states purpose of statute was to cure the following evil: the vendee "having possession of the property, and being the apparent owner, easily obtained credit on the faith of it, and, when it became necessary to resort to it to satisfy just debts, he would take shelter behind the (vendor), who retained the title").

[6] Sills v. Ford, 171 N. C. 733, 88 S. E. 636 (1916) (this case holds that a deed takes effect from the date of registration; see Francis v. Herren, 101 N. C. 497, 507, 8 S. E. 353, 358 (1888) to the effect that the similarity of language of the statutes requiring the registration of deeds and of chattel mortgages gives them the same import and scope).

the chattel mortgagee would seem to have become a creditor prior to the time that the vendee acquired possession.[7] This removes the case from the reason of the statute and suggests the desirability of a result contrary to that reached.[8] Three analogous types of cases, in which the statute has been held inapplicable, point to the same conclusion: first, cases in which a mortgagee is in possession;[9] second, cases in which a judgment creditor obtains a judgment before the execution of a conditional sale contract and the transfer of possession of property thereunder;[10] and third, cases in which there was a mortgage on after acquired property. In the last situation liens already on the property when it came into the hands of the mortgagor were held not to be displaced.[11]

The provision of the Uniform Conditional Sales Act, protecting purchasers from or creditors of the buyer, is drafted to protect both prior and subsequent creditors who have acquired a lien on the goods by levy or attachment and would take care of several of the problems raised in the instant case.[12]

NAOMI ALEXANDER.

Criminal Procedure—Use of Suspended Sentence to Secure Civil Redress.

In a criminal prosecution[1] for assault with a deadly weapon the defendant was convicted, fined $250, and sentenced to two years imprisonment. Capias was not to issue, however, if payment of $2500 was made to prosecutrix in $50 monthly installments, the same to be

[7] North Carolina recording statute protects lien creditors only and not general creditors. See Francis v. Herren, *supra* note 6, at 507, 8 S. E. at 358; National Bank of Goldsboro v. Hill, 226 Fed. 102, 115 (E. D. N. C. 1915).

[8] ALA. CODE (Michie, 1928) §6898 (recording statute protects "judgment creditors" generally); GA. CODE ANN. (Michie, 1926) §3318 (recording statute protects "third parties"); both of these statutes have been construed to protect a subsequent and not a prior creditor, in the following respective cases: Elliott v. Palmer, 9 Ala. App. 483, 64 So. 182 (1913); Conder v. Holleman, 71 Ga. 93 (1883).

[9] Cowan v. Whitener, 189 N. C. 684, 128 S. E. 155 (1925); JONES, *op. cit. supra* note 3, §§178, 236; Note (1910) 25 L. R. A. (N. S.) 110, 115.

[10] Note (1928) 55 A. L. R. 1137; Second National Bank v. Ohio Contract Purchase Co., 28 Ohio App. 93, 162 N. E. 460 (1927).

[11] Standard Dry Kiln Co. v. Ellington, 172 N. C. 481, 90 S. E. 564 (1916).

[12] UNIFORM CONDITIONAL SALES ACT §5: "Every provision in a conditional sale reserving property in the seller, shall be void as to any purchaser from or creditor of the buyer, who, without notice of such provision, purchases the goods or acquires by attachment or levy a lien upon them, before the contract or a copy thereof shall be filed as hereinafter provided, unless such contract or copy is so filed within ten days after the making of the conditional sale."

[1] State v. Barnhardt, June term, 1927, Forsyth Superior Court.

secured by sufficient bond. The prosecutrix agreed, in consideration of the undertaking, to take a nonsuit in the civil action then pending against the defendant. The latter defaulted after payment of $1350, and plaintiff brought action on bond to collect remainder. From a judgment of nonsuit, plaintiff appealed and was awarded a new trial.[2]

Suspended judgments are now accepted in both theory and practice by North Carolina courts.[3] Conditions of suspension vary widely in nature and number.[4] In the principal case, payment of costs and fine, filing of bond to indemnify the injured party, and the non-operation of an automobile for two years were conditions imposed.[5] The breach or non-performance of one of the several conditions of a suspended sentence is sufficient to invoke enforcement of the entire judgment.[6] Full performance by the defendant was seemingly required in the instant case. If it may be considered that the settlement of the pending civil action became a condition of suspension, it would appear that the case illustrates a material extension in the scope of the

[2] Myers v. Barnhardt, 202 N. C. 49, 161 S. E. 715 (1932).

[3] Chief Justice Stacy, writing the opinion in the instant case, says that "the practice of suspending judgments in criminal prosecutions, upon terms that are reasonable and just, or staying executions therein for a time, with the consent of the defendant, has so long prevailed in our courts of general jurisdiction that it may now be considered established by both custom and judicial decision, as a part of the permissible procedure in such cases." This language is supported by State v. Edwards, 192 N. C. 321, 135 S. E. 37 (1926); State v. Everitt, 164 N. C. 399, 79 S. E. 274, 47 L. R. A. (N. S.) 848 (1913).

[4] Sentences have been suspended in North Carolina upon these conditions: good behavior, State v. Everitt, *supra* note 3; that the defendant leave the state, State v. McAfee, 198 N. C. 507, 152 S. E. 391 (1930); that he leave the county permanently, *Ex parte* Hinson, 156 N. C. 250, 72 S. E. 310, 36 L. R. A. (N. S.) 352 (1911); that he pay the costs, State v. Griffis, 117 N. C. 709, 23 S. E. 164 (1895); that he keep the peace and not libel certain persons, State v. Sanders, 153 N. C. 624, 69 S. E. 272 (1910); that he observe the prohibition laws and show good behavior, State v. Tripp, 168 N. C. 150, 83 S. E. 630 (1914). Comments upon North Carolina cases are to be found in (1922) 1 N. C. L. REV. 116; (1928) 6 N. C. L. REV. 327; (1930) 8 N. C. L. REV. 465. Valuable notes on the topic in its wider application are found in (1912) 12 COL. L. REV. 543; (1917) 30 HARV. L. REV. 369.

[5] Counsel for the defense raised the objection on appeal that the judgment rendered in the trial court was void for alternativeness, but the court rejected the plea. But few criminal judgments have been declared void for this reason in North Carolina. The writer has been able to discover but three such cases: State v. Bennett, 20 N. C. 170 (1838); State v. Perkins, 82 N. C. 682 (1880); *In re* Deaton, 105 N. C. 59, 11 S. E. 244 (1890).

[6] In State v. Strange, 183 N. C. 775, 111 S. E. 350 (1922), judgment was suspended on payment of costs and continued good behavior for two years. The costs were paid and the defendant released. But on proof of subsequent violation of the liquor laws his sentence was put into effect. In State v. Hardin, 183 N. C. 815, 112 S. E. 593 (1922), the terms of the suspension were payment of costs, payment of private prosecutor's fees, and good behavior. An attempt was made to enforce the sentence because of alleged breach of the last-named conditions, but on appeal the case was reversed because of insufficient evidence on this one point.

suspended judgment as most commonly employed in North Carolina.[7]

Where a criminal action follows the civil action, clearly no enforceable settlement based on a promise to forego criminal prosecution may be reached since it would run counter to the inhibition of stifling criminal prosecutions.[8] But this so-called "public policy" objection does not apply to stifling purely civil actions, *i.e.* to their settlement out of court. This raises the question of the advisability of "double adjudication," or the settlement of civil disputes in connection with criminal prosecutions.[9] Our past judicial theory and practice have been in favor of separate settlements. Most decidedly have the courts been opposed to the *substitution* of one for the other.[10] The practice, nevertheless, seems to have seeped into the judicial structure, notably in "bad check" cases appearing in justice of the peace courts. It is submitted that the *merger* of civil into criminal actions in proper circumstances is a practice worthy of commendation for the reasons that: (1) litigation is minimized; (2) an injured party has a better chance of restitution when the wrong-doer is financially irresponsible;[11] (3) criminal prosecution is not stifled.

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[7] A slight variation from this type of case is to be found in State v. Schlichter, 194 N. C. 277, 139 S. E. 448 (1927), in which the judgment rendered was held to be neither an alternative nor a suspended judgment, but a suspended execution. The defendants, officers of a defunct bank, had been convicted and sentenced for violation of the state banking laws. Capias was to issue at the next term of court in the event that the presiding judge found as a matter of fact that the defendants had failed to make proper restitution to the receiver. The analogy with the principal case is clear: in each instance the defendants could avoid imprisonment by making restitution to the injured individuals.

[8] Corbett v. Clute, 137 N. C. 546, 50 S. E. 216 (1905), was an action to foreclose a mortgage, the sole consideration and inducement of which was that the plaintiff would refrain from prosecuting the defendant's son for obtaining goods and money under false pretenses. The court quoted with approval from Garner v. Qualls, 49 N. C. 223, 224 (1856). "It is manifest that contracts founded upon agreements to compound felonies or to stifle public prosecution of any kind" cannot be enforced in a court of justice. Strong language was employed by the court, speaking through Chief Justice Smith, in Commissioners of Guilford County v. March, 89 N. C. 268, 271 (1883): "The principle is too well settled to require more than its mere enunciation, that any instrument taken which tends to obstruct the *firm* and *impartial* administration of public justice, will not be recognized and enforced."

[9] It is obvious that the two actions—civil and criminal—would have to arise from the same transaction.

[10] To agree to refrain from a threatened criminal prosecution in consideration of a private settlement would be in notorious violation of the principles so zealously protected in the cases cited *supra* note 8, and also laid down in Johnson v. Pittman, 194 N. C. 298, 139 S. E. 440 (1927).

[11] The brief for the defendant affirms a suspicion raised by the report of the case to the effect that although the plaintiff could have secured a judgment against the defendant in the civil action begun, but subsequently abandoned, it would have been in fact worthless because of the defendant's financial status. Unless the type of settlement here secured be more widely adopted, many a hapless victim of one's wrong-doing will go unrecompensed because the defendant is without estate.

Injunctions—Method of Continuing Dissolved Temporary Injunction Pending Appeal.

In a recent West Virginia case[1] a temporary injunction restraining the defendant from violating certain contracts, granted upon the filing of plaintiff's bill, was, after a hearing, dissolved. A stay, pending appeal, was refused. Subsequently, the appellate court granted an appeal and a supersedeas, for which the plaintiff executed the required bond. Later, the defendant, relying on advice of counsel that the supersedeas did not reinstate the temporary injunction, violated the express terms of the order. In proceedings for contempt, it was held that the supersedeas fully restored the temporary injunction and that the defendant was guilty.

When there is an appeal from an order dissolving a temporary injunction, there are three main ways in the various states by which the injunction may be reinstated and continued in force pending the appeal: (1) the appeal itself; (2) issuance by the appellate court of a supersedeas of stay of the order of dissolution; (3) a stay order entered by the trial court. The first method obtains in only a few states.[2] In most jurisdictions, unless a statute otherwise provides, an appeal does not of itself have the effect of continuing the dissolved injunction.[3] As a rule, an appeal and an order from the appellate court granting a supersedeas or stay of the order of dissolution restores the injunction to its full effect until the appeal is disposed of.[4] Even in the jurisdictions where the matter is controlled ex-

[1] State *ex rel.* O. Hommel Co. v. Fink, 161 S. E. 557 (W. Va. 1932).

[2] State *ex rel.* Leary v. Tenth Judicial District, 78 Minn. 464, 81 N. W. 323 (1900) (appeal operates to revive and continue the injunction); State v. Baker, 62 Neb. 840, 88 N. W. 124 (1901) (statute provides that appeal reinstates the dissolved injunction); see Ford v. State, 209 S. W. 490, 491 (Tex. Civ. App. 1919).

[3] Hulan v. Murfin, 159 Mich. 605, 124 N. W. 574 (1910) (dissolved injunction not revived by appeal); Roberts v. Kartzke, 18 Idaho 552, 111 Pac. 1 (1910) (does not operate as a supersedeas of the order appealed from); Gallup v. St. Louis, I. M. & S. Ry. Co., 158 Ark. 624, 251 S. W. 30 (1923); Reyburn v. Sawyer, 128 N. C. 8, 37 S. E. 954 (1901).

In some states the trial court has the power to preserve the *status quo* although the case has been removed by appeal to the supreme court. Mews v. Home Bank of DeWitt, 133 Ark. 144, 201 S. W. 1106 (1918). In others the dissolved injunction may be reinstated only by order of the appellate court. Cutrona v. Mayor & Council of Wilmington, 14 Del. Ch. 262, 125 Atl. 417 (1924). *Contra:* Napa Valley Electric Co. v. Calistoga Electric Co., 174 Cal. 411, 163 Pac. 497 (1917) (appellate court has no power to reinstate dissolved injunction).

[4] State *ex rel.* Woodcock v. Barrick, 80 W. Va. 63, 92 S. E. 234 (1917); New River Mineral Co. v. Seeley, 117 Fed. 981 (W. D. Va. 1902); McMichael v. Eckman, 26 Fla. 43, 7 So. 365 (1890) (statute provides for supersedeas); Smith v. Whitfield, 38 Fla. 211, 20 So. 1012 (1896).

clusively by statute the provisions are by no means uniform. It is provided, in a few states, that the appeal automatically continues the injunction in force.[5] Other statutes state that the appeal shall not have this effect unless it shall be so ordered by the trial court.[6] In some jurisdictions the injunction may, at the discretion of the trial judge, without a separate order, be continued in force pending the appeal.[7] In others, the statutes require an order of the appellate court to reinstate the dissolved injunction.[8]

Under the North Carolina statute[9] the trial judge may, at his discretion, continue the original order in force until the appeal is determined; but the injunction does not remain in force unless it is so specified in the order of dissolution.[10] This rule seems better adapted to do equity and to protect the rights of the parties than to have the appellate court handle the matter. At the hearing the trial judge has the facts of the case before him, and he then may ascertain more accurately, more rapidly and less expensively than the appellate court, whether, in order to preserve the *status quo* or to prevent irreparable injury, it is necessary that the injunction remain in force. If, on the other hand, the appeal and posting of a bond were automatically to continue the injunction in force, injustice might result in some cases.

The principal case seems correctly decided, however, under the West Virginia procedure. The mistake of counsel was apparently due to the conflict between the trial courts refusal of a stay and the appellate courts supersedeas.

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[5] NEB. COMP. STAT. (1929) §1920 (posting of supersedeas bond continues the injunction in force until the appeal is determined); State v. Baker, *supra* note 2; WASH. COMP. STAT. (Remington, 1922) §1723 (where a temporary injunction has been dissolved, the injunction will be continued in force pending the appeal); State v. Superior Court of King County, 30 Wash. 197, 70 Pac. 233 (1902).

[6] TEX. REV. CIV. STAT. (1925) art. 4662; Bass v. City of Clifton, 297 S. W. 872 (Tex. Civ. App. 1927).

[7] S. D. COMP. LAWS (1929) §3160; N. C. CODE ANN. (Michie, 1931) §858 (a).

[8] FLA. COMP. LAWS (1927) §4662; Smith v. Whitfield, *supra* note 4; OHIO CODE (Throckmorton, 1929) §12225 (order of dissolution may not be suspended except by order of the court of appeals); MONT. REV. CODE (Choate, 1921) §8807 (supreme court may continue injunction pending appeal).

[9] N. C. CODE ANN. (Michie, 1931) §858 (a).

[10] Though there is no direct authority to this effect, this seems to be the correct interpretation, since the appeal itself does not continue the dissolved temporary injunction. Reyburn v. Sawyer, *supra* note 3.

Labor Law—Employee's Rights Under Union-Employer Agreements.

In the United States agreements between unions and employers are very generally held as between the parties to be valid contracts, and decrees in equity have been handed down at the request of the other party enjoining a breach by the union[1] or by the employer.[2] In one instance damages were recovered by the employer against the union.[3] It appears by a dictum in a recent case, however, that such agreements are unenforceable in England and in Canada.[4]

Where it is held that a union-employer agreement is not enforceable by the parties thereto, it naturally follows that it is unenforceable by any third party,[5] unless it be held that the union was the agent of the individual employee. This contention of agency has been expressly repudiated.[6] Two cases in the United States have been found which, while holding the contract valid as between the union and the employer, refuse to an individual employee any right of action based thereon.[7] It is to be observed, however, that the Mississippi Court reversed this holding in a later decision;[8] and that the other decision comes from a federal district court in North Dakota,[9] and may, perhaps, be reversed on appeal.

The great weight of authority in the United States is to the effect that the individual employee does have enforceable rights under a union-employer agreement. This conclusion is reached by either of

[1] Burgess v. Georgia F. & A. Ry Co., 148 Ga. 415, 96 S. E. 864 (1918); Gilchrist Co. v. Metal Polishers, etc. Union, 113 Atl. 320 (N. J. Eq. 1919); Meltzer v. Kaminer, 227 N. Y. Supp. 459, 131 Misc. 813 (1927).

[2] Schlesinger v. Quinto, 194 N. Y. Supp. 401, 201 App. Div. 487 (1922); Goldman v. Cohen, 227 N. Y. Supp. 311, 222 App. Div. 631 (1928); Weber v. Nasser, 286 Pac. 1047 (Cal. 1930).

[3] Nederlandsch Amerikaansche Stoomvaart Maatschappy v. Stevedores' & Longshoremens' Benevolent Assoc., 265 Fed. 397 (E. D. La. 1920).

[4] Young v. Canadian Northern Ry. Co., (1931) App. Cas. 83, in which, in contrast to the prevalent liberal view of industrial relations existing in England, Lord Russell of the Privy Council says, "if an employer refused to observe the rule, the effective sequel would be, not an action by any employee, not even an action by Division No. 4 (the union) against the employer for specific performance or damages, but the calling of a strike until the grievance was remedied." Commented upon, Note (1932) 26 ILL. L. REV. 922.

[5] See Young v. Canadian Northern Ry. Co., *supra* note 4, at 89 ("By itself it constitutes no contract between any individual employee and the company which employs him").

[6] Burnetta v. Marceline Coal Co., 180 Mo. 241, 79 S. W. 136 (1904); Piercy v. Louisville & N. Ry. Co., 198 Ky. 477, 248 S. W. 1042 (1923).

[7] Chambers v Davis, 128 Miss. 613, 91 So. 346 (1922); Kessell v. Great Northern Ry. Co., 51 F. (2d) 304 (W. D. N. D. 1931).

[8] Yazoo & M. V. Ry. Co. v. Sideboard, 133 So. 667 (Miss. 1931).

[9] Kessell v. Great Northern Ry. Co., *supra* note 7.

two theories,[10] viz., (1) that the union-employer agreement establishes a usage which automatically becomes a part of every employee's individual contract of employment,[11] and (2) that the individual employee is a third party beneficiary.[12] The same rule of law applies whether the employee is seeking damages for injuries caused by a breach of the agreement,[13] or is seeking specific performance of some particular stipulation of the agreement.[14]

The earlier cases refused the employee a recovery on the ground that, since he had not bound himself for any specific time, but rather could quit at will, there was no mutuality of obligation, and consequently no binding contract as to him.[15] All but a few of the cases found that have been reported since 1914,[16] however, permit the employee to recover. The contention of no mutuality is either

[10] One case was found which was decided on the basis that the employee acquired no enforceable rights unless he had ratified the agreement. West v. B. & O. Ry. Co., 103 W. Va. 422, 137 S. E. 654 (1927).

[11] Moody v. Model Window Glass Co., 145 Ark. 197, 224 S. W. 436 (1920); Cross Mountain Coal Co. v. Ault, 157 Tenn. 461, 9 S. W. (2d) 692 (1928); St. Louis, B. & M. Ry. Co. v. Booker, 287 S. W. 130 (Tex. 1926); Gregg v. Starks, 188 Ky. 834, 224 S. W. 459 (1920). Several of the decisions found say nothing about the basis of the employee's right, but take for granted that there exists a valid contract as to the individual employee containing the terms of the union-employer agreement, thus implying the incorporation by usage. Mostell v. Salo, 140 Ark. 408, 215 S. W. 583 (1919); Gary v. Central of Georgia Ry. Co. 37 Ga. App. 744, 141 S. E. 819 (1928); Hall v. St. Louis & San Francisco Ry. Co., 28 S. W. (2d) 687 (Mo. 1930); Piercy v. Louisville & N. Ry. Co., *supra* note 6.

[12] Gulla v. Barton, 149 N. Y. 952, 164 App. Div. 293 (1914); Yazoo & M. V. Ry. Co., *supra* note 8; H. Blum & Co. v. Landau, 23 Ohio App. 426, 155 N. E. 154 (1926); Marshall v. Charleston & W. C. Ry. Co., 162 S. E. 348 (S. C. 1931); Johnson v. Am. Ry. Express Co., 161 S. E. 473 (S. C. 1931).

[13] Judgments have been returned in favor of the employee in actions for damages for wrongful discharge. Marshall v. Charleston W. C. Ry. Co., *supra* note 12; Johnson v. Am. Ry. Express Co., *supra* note 12; Gary v. Central of Georgia Ry. Co., *supra* note 11; H. Blum & Co. v. Landau, *supra* note 12; Hall v. St. Louis & San Francisco Ry. Co., *supra* note 11; Cross Mountain Coal Co. v. Ault, *supra* note 11. And in actions for payment of less than the agreed union wage. Mostell v. Salo, *supra* note 11; United States Daily Publishing Corp. v. Nichols, 32 F. (2d) 834 (D. C. C. A. 1929); Moody v. Model Window Glass Co., *supra* note 11; Gula v. Barton, *supra* note 12; Yazoo & M. V. Ry. Co. v. Sideboard, *supra* note 8.

[14] Judgments have been recovered enforcing specific performance of the contract as to seniority rights. Piercy v. Louisville & N. Ry. Co., *supra* note 6; Gregg v. Starks, *supra* note 11.

[15] St. Louis, I. M. & S. Ry. Co. v. Matthews, 64 Ark. 398, 42 S. W. 902, 36 L. R. A. 467 (1897); Hudson v. Cincinnati, N. O. & T. P. Ry. Co., 52 Ky. 711, 154 S. W. 47, 45 L. R. A. (N. S.) 184, Ann. Cas. 1915B, 98 (1913).

[16] 1914 seems to mark a definite turn-about, as all the cases found decided up to Hudson v. Cincinnati N. O. & T. P. Ry. Co., *supra* note 15, refuse recovery to the employee; whereas, with the exception of Kessell v. Great Northern Ry. Co., *supra* note 7, West v. B. & O. Ry. Co., *supra* note 10; and Chambers v. Davis, *supra* note 7, all the cases found since Gulla v. Barton, *supra* note 12, give judgment for the employee.

ignored[17] or expressly repudiated.[18] One early case held that the mere fact that the parties knew the terms of the agreement could not be construed as a contract to work under those terms, even though the employee was a member of the union.[19] The later cases, however, carry the implied incorporation of the union-employer agreement to the extent of permitting a recovery of union wages by the employee where there existed no contract between the particular employer and the union, because the parties knew of the existing wage rate as established by the union-employer agreement obtaining in that trade, and because no other wage was specified.[20]

Only a few courts have based the employee's right of action on the theory that he is a third party beneficiary. The objection that the employee's name does not appear on the face of the agreement is held not to affect this right.[21] This theory of third party beneficiary has been carried so far as to permit the employee to recover the union rate of wages, even though he, not knowing of the agreement, had subsequently entered into a separate contract with the employer at a lesser wage.[22]

Under both the theory of incorporation by usage[23] and the theory of third party beneficiary,[24] the courts have reached the seemingly anomalous result that a "non-union" employee can recover under the union-employer agreement as well as a "union" employee. The opinion in *Yazoo & M. V. R. Co. v. Sideboard*[25] shows that the basis for this apparent strain on the intention of the parties is a desire on

[17] Mostell v. Salo, *supra* note 11; H. Blum & Co. v. Landau, *supra* note 12; Hall v. St. Louis & San Francisco Ry. Co., *supra* note 11.

[18] Cross Mountain Coal Co. v. Ault, *supra* note 11; St. Louis B. & M. Ry. Co. v. Booker, *supra* note 11, at 859 ("We cannot agree with appellant that the agreement is unenforceable for lack of mutuality or want of consideration. This promise of the employer is a part of the consideration inducing employees to enter and remain in the service, and the continuous performance of the duties of their employment is a valuable consideration to the railway.")

[19] Burnetta v. Marceline Coal Co., *supra* note 6.

[20] United Daily Publishing Corp v. Nichols, *supra* note 13; Model Window Glass Co. v. Moody, 150 Ark. 142, 233 S. W. 1092 (1921).

[21] Yazoo & M. V. Ry. Co. v. Sideboard, *supra* note 8; Gulla v. Barton, *supra* note 12. See H. Blum & Co. v. Landau, *supra* note 12, at 157 ("Where the name of the third person does not appear to the contract, if the terms are made for the benefit of such person the provisions of the contract are enforceable").

[22] Gulla v. Barton, *supra* note 12.

[23] Gregg v. Starks, *supra* note 11.

[24] Yazoo M. V. Ry. Co. V. Sideboard, *supra* note 8.

[25] *Supra* note 8, which holds that the union meant to include the non-union employees as third party beneficiaries, on the grounds that since the agreement does not call for a "closed shop," if the railroads were permitted to pay non-union men a less wage, the union would gradually disappear from the service, and the entire object of the collective agreement defeated.

the part of the courts to construe the contract so as to strengthen rather than weaken the accomplishment of the union's objectives in collective bargaining.

The two recent South Carolina cases of *Johnson v. American Railway Express Co.*,[26] and *Marshall v. Charleston & W. C. Ry. Co.*,[27] which hold that an employee injured by the employer's breach of the union-employer agreement respecting due process in the method of discharge, are, therefore, not only in accord with the trend of American law[28] in this field, but they constitute hopeful indications of a sympathetic attitude upon the part of the southern judiciary toward the significance of the unionization of southern industry.

IRVIN E. ERB.

Landlord and Tenant—Liability for Personal Injuries Caused By Breach of Landlord's Agreement to Repair.

Plaintiff, an infant of a tenant, was injured by the falling of a door due to defective hinges. In the lease, the lessors (defendants) had agreed to keep the premises in good repair at all times during the tenancy. On demurrer, *held* the action was *ex contractu;* only such damages are recoverable as were reasonably within the contemplation of the parties when the contract was made; and damages for personal injuries are too remote. Defendant's demurrer upheld.[1]

In the absence of statute,[2] or of a valid covenant or stipulation in the lease,[3] the lessor is not bound to make ordinary repairs to the leased premises,[4] nor is he bound to pay for such repairs made by the

[26] *Supra* note 12.

[27] *Supra* note 12.

[28] Rice, *Collective Labor Agreements In American Law,* (1932) 44 HARV. L. REV. 572; Fuchs, *Collective Labor Agreements in American Law* (1925) 10 ST. LOUIS L. REV. 1; WITTE, THE GOVERNMENT IN LABOR DISPUTES (1932).

[1] Timmons v. Williams Wood Products Corporation, 162 S. E. 329 (S. C. 1932).

[2] Annis v. Britton, 232 Mich. 291, 205 N. W. 128 (1925); Smithfield Improvement Co. v. Coley-Bardin, 156 N. C. 255, 72 S. E. 312 (1911); see Bushman v. Bushman, 311 Mo. 551, 279 S. W. 122, 126 (1925).

Some jurisdictions have by statute imposed an obligation to repair and made the lessor liable in tort. Klein v. Young, 163 La. 59, 111 So. 495 (1927); Jarchin v. Rubin, 128 Misc. 437, 218 N. Y. Supp. 269 (1926).

[3] Lesser v. Kline, 101 Conn. 740, 127 Atl. 279 (1925); Cox v. Walter M. Lawney Co., 35 Ga. 51, 132 S. E. 257 (1926); Fields v. Ogburn, 178 N. C. 407, 100 S. E. 583 (1919); Hudson v. Anson Real Estate & Insurance Co., 185 N. C. 342, 117 S. E. 165 (1923).

[4] Farber v. Greenberg, 98 Cal. App. 675, 277 Pac. 534 (1929); Newman v. Golden, 108 Conn. 676, 144 Atl. 467 (1929); Richmond v. Standard Elkhorn Coal Co., 222 Ky. 150, 300 S. W. 359, 58 A. L. R. 1423 (1927); Duffy v. Hartsfield, 180 N. C. 151, 104 S. E. 139 (1920) (especially where the defects are apparent when the lease is made).

tenant.[5] However, the parties to a tenancy may agree that the landlord shall make necessary repairs.[6]

The courts are divided on the question of a lessor's tort liability on his covenant to repair demised premises. The ruling in the principal case is in accord with the decisions in England and in a majority of the jurisdictions in the United States. These authorities hold that the landlord's failure to comply does not impose tort liability[7] but merely gives rise to an action *ex contractu*,[8] and following the general rule of damages,[9] rigidly assert that damages for personal injuries are too remote and not within the contemplation of the parties.[10]

On the other hand, a number of states have imposed tort liability on the landlord who has covenanted to repair and negligently fails to do so.[11] The contract to repair is deemed a matter of inducement from which arises the affirmative duty to exercise due care toward all who are rightfully upon the premises.[12] It is also suggested that the

[5] Sueskind v. Michael Hardware Co., 228 Ky. 780, 15 S. W. (2d) 528 (1929); Halsell v. Scurr, 297 S. W. 524 (Tex. Civ. App. 1927).

[6] Magee v. Indiana Business College, 89 Ind. App. 640, 166 N. E. 607 (1929).

[7] Cavalier v. Pope, (1906) A. C. 428; Cameron v. Young, (1908) A. C. 176; Murrell v. Crawford, 102 Kan. 118, 169 Pac. 561 (1917); Fiorntino v. Mason, 233 Mass. 451, 124 N. E. 283 (1919); Dustin v. Curtis, 74 N. H. 266, 67 Atl. 220, 13 Ann. Cas. 169 (1907).

[8] Willis v. Snyder, 190 Iowa 248, 180 N. W. 290 (1920); O'Neil v. Brown, 158 Ky. 118, 164 S. W. 315 (1914); Williams v. Fenster, 103 N. J. L. 566, 137 Atl. 406 (1927).

[9] Beindorf v. Thorpe, 126 Okl. 157, 259 Pac. 242 (1927); Gordon v. Curtis Bros., A. D. Moodie House Moving Co., 119 Ore. 55, 248 Pac. 158 (1926).

[10] Schick v. Fleischhauer, 26 App. Div. 210, 49 N. Y. Supp. 962 (1898); Kushes v. Ginsberg, 99 App. Div. 417, 91 N. Y. Supp. 216 (1904), 188 N. Y. 630, 81 N. E. 1186 (1907); Tucker v. Yarn Mill Co., 194 N. C. 756, 140 S. E. 744 (1927); see Jordan v. Miller, 179 N. C. 73, 75, 101 S. E. 550, 551 (1919).

The same has been said of damage to the tenant's property. Bowling v. Carroll, 122 Ark. 23, 182 S. W. 514 (1916); Hendry v. Squier, 126 Ind. 19, 25 N. E. 830, 9 L. R. A. 798 (1890). *Contra:* Gabai v. Krakovitz, 98 Pa. Super. Ct. 150 (1929).

In O'Neil v. Brown, 158 Ky. 118, 164 S. W. 315 (1914), it was held that the damages contemplated might be enlarged by the fact of notice. In Massachusetts, a jurisdiction accepting the prevailing doctrine, the landlord is liable in tort when he agrees to maintain the premises in a "safe"condition. Miles v. Janvrin, 196 Mass. 431, 82 N. E. 708, 124 Am. St. Rep. 575, 13 L. R. A. (N. S.) 378 (1907) *semble*. Also in Alabama, when the covenant was an inducement to the tenant's remaining after threatening to vacate, it was held that the injuries were in the contemplation of the parties: Hart v. Coleman, 201 Ala. 345, 78 So. 201, L. R. A. 1918 E. 213 (1918).

[11] Collison v. Curtner, 141 Ark. 122, 216 S. W. 1059 (1919); Robinson v. Heil, 128 Md. 645, 98 Atl. 195 (1916); Barron v. Liedloff, 95 Minn. 474, 104 N. W. 289 (1905); Merchant's Cotton Press & Storage Co. v. Miller, 135 Tenn. 187, 186 S. W. 87, L. R. A. 1916F 1137 (1916); Flood v. Pabst Brewing Co., 158 Wis. 626, 149 N. W. 489, L. R. A. 1916F 1101 (1914).

[12] Clark v. Engelhardt, 9 La. App. 34, 120 So. 498 (1929) (this duty is a non-delegable one, so the landlord is liable for the negligence of an inde-

covenant to repair gives the lessor a privilege of entering the premises for the purposes of repair and consequently a power of control sufficient to impose tort liability.[13] The minority doctrine is accepted by the American Law Institute.[14]

The cases adopting the majority view seem to hold that the tenant is in contributory fault—although not so expressed—in remaining in possession with knowledge of the defects,[15] and that it is the duty of the tenant to make repairs and charge the cost thereof to the landlord.[16]

The law in North Carolina is in accord with the prevailing doctrine. In *Tucker v. Yarn Mill Co.*,[17] a tenant was injured by breaking through a defective board in the porch. The lease contained the

pendent contractor in making repairs); Barron v. Liedloff, 95 Minn. 474, 104 N. W. 289 (1905); Marks v. Nambil Realty Co., 245 N. Y. 256, 157 N. E. 129 (1927) (landlord is liable for negligence in making gratuitous repairs).

For the landlord's total failure to make promised repairs (non-feasance) only the minority impose tort liability, but where the lessor repairs negligently (misfeasance), all the courts agree that he is liable for resulting injuries. Smith v. Tucker, 151 Tenn. 374, 270 S. W. 66 (1925); see Murrell v. Crawford, 102 Kan. 118, 169 Pac. 561, 562 (1917).

[13] Where the lessor has complete control of a part of the premises, he is liable for personal injury resulting from defective condition. Medlock v. McAlister, 120 S. C. 65, 112 S. E. 436 (1922) (elevator).

Lord Atkinson, in Cavalier v. Pope, (1906) A. C. 428, 433: "The power of control necessary to raise the duty implies something more than the right to repair"; Stevens, J., in Willis v. Snyder, 190 Iowa 248, 180 N. W. 290 (1920): "No implied reservation of control over the premises arises from a mere agreement of the lessor to keep them in repair."

[14] TORTS RESTATEMENT, (AM. L. INST. 1929) §227: "LIABILITY WHERE LESSOR COVENANTS TO REPAIR. A lessor of land is subject to liability for bodily harm caused to his lessee and others upon the land in the right of the lessee by a condition of disrepair existing before or arising after the lessee has taken possession, if (a) the lessor, as such, has agreed by a covenant in the lease or otherwise to keep the land in repair, and (b) the disrepair creates an unreasonable risk to persons upon the land which the performance of the lessor's agreement would have prevented."

[15] Cohen v. Krumbein, 28 Ga. App. 788, 113 S. E. 58 (1922); Rose v. Butler, 69 Hun. 140, 23 N. Y. Supp. 375 (1893). *Contra:* Kreppelt v. Green, 218 S. W. 354 (Mo. 1920).

[16] Buck v. Rodgers, 39 Ind. 222 (1872); see Jordan v. Miller, 179 N. C. 73, 75, 101 S. E. 550, 551 (1919). *Contra:* Vandergrift v. Abbott, 75 Ala. 487 (1883); Spencer v. Hamilton, 113 N. C. 49, 18 S. E. 167 (1893).

[17] 194 N. C. 756, 140 S. E. 744 (1927).

In Hudson v. Anson Real Estate & Insurance Co., 185 N. C. 342, 117 S. E. 165 (1923), where there was no express agreement to repair, the plaintiff was nonsuited. The court said, "And even with a covenant to repair, the general rule is that such a liability will not be usually imputed."

In Jordan v. Miller, *supra* note 10, where there was a covenant that the landlord repair, the plaintiff, employee of the tenant, was not allowed to recover for personal injury because the jury found that she was contributorily negligent in stepping through the hole in the platform, but the court said, quoting from 16 R. C. L. 1095, that ordinarily where the landlord breaches his contract to repair, the tenant cannot recover for personal injuries, whether in contract or tort.

landlord's agreement to repair. The plaintiff was nonsuited, the court holding that the damages were too remote and not within the contemplation of the parties.

JULE MCMICHAEL.

Registration—Similarity In Name As Notice.

On petition for the recognition of mortgagee's claim as a lien against the funds of the mortgagor's trustee in bankruptcy, *held,* where the mortgagor's creditors knew that it had conducted a flying school under the name of "Greer College of Motoring," a mortgage so recorded was constructive notice of a lien against "Greer College and Airways." And had the creditors not had such information, they would have been presumed to know that flying machines require motors.[1]

Most courts strictly construe the recordation statutes. When the Christian name is wrong,[2] or omitted,[3] the record is said not to be notice. On the other hand, omission of the first name and substitution of the middle name is held fatal by some courts[4] and immaterial by others.[5] In the case of common diminutives and corruptions of proper names, the almost universal view is that the searcher is given sufficient notice.[6] It is also held in the use of the proper initial for

[1] *In re* Greer College and Airways, 53 F. (2d) 585 (C. C. A. 7th, 1931). The other ground for the decision was that under an existing Illinois statute which required several steps in the process of change of corporate name, the name had not in fact been changed until the final step.

[2] Zimmerman v. Briggans, 5 Watts 186 (Pa. 1836); Stark v. Weisner, 214 N. Y. Supp. 292 (1926); Bankers' Loan and Investment Co. v. Blair, 99 Va. 606, 39 S. E. 213 (1901); Zimmer v. Dunlap, 99 N. J. Eq. 610, 133 Atl. 514 (1926); Bernstein v. Schoenfeld, 81 N. Y. Supp. 11 (1902). *Contra:* Ouimert v. Sirous, 124 Mass. 162 (1877) (Joseph Cyr, sufficient notice to one searching for Germain Sirous: decision due to Massachusetts doctrine that things good between parties are good as to third persons).

[3] Ridgway's Appeal, 15 Pa. 177 (1850); Richardson v. Gardner, 128 Va. 676, 105 S. E. 225 (1920).

[4] Johnson v. Hess, 126 Ind. 298, 25 N. E. 445 (1890) (William not notice to one looking for Henry W.); Haring v. Murphy, 113 N. Y. Supp. 452 (1908).

[5] Loser v. Plainfield, 149 Iowa 672, 128 N. W. 1101 (1910); Jenny v. Zehnder, 101 Pa. 296 (1882) (F. Zehnter, notice of John Jacob Frederick Zehnder).

[6] H. R. & Co. v. Smith, 208 N. Y. Supp. 396, 151 N. E. 448 (1926) (Bess and Elizabeth); Burns v. Ross, 215 Pa. 293, 64 Atl. 526 (1910) (Frank and Francis); Goodell v. Hall, 112 Ga. 435, 37 S. E. 725 (1900) (Elizabeth and Eliza); Styles v. Theo. P. Scotland and Co., 22 N. D. 469, 134 S. W. 708 (1912) (Charles and Charlie); Fallon v. Kehoe, 38 Cal. 44 (1869) (Darby and Jeremiah). *Contra:* Thomas v. Desney, 57 Iowa 58, 10 N. W. 315 (1881) (Helen and Ellen); Zimmerman v. Briggans, *supra* note 2 (John and Jacob); Thornily v. Prentice, 121 Iowa 89, 96 N. W. 728 (1903) (Willis and Wiliam).

the Christian name,[7] or where the first and middle names are transposed,[8] that a person should be put on inquiry. But where the initial is wrong[9] the variance destroys the effect of the record as notice; although some courts have gone to the extreme of holding two wrong initials immaterial.[10]

Due to increased modern usage, the weight of authority now holds a mistake in the middle initial,[11] or its omission,[12] to defeat the record. A cursory glance at the city directory will convince one of the wisdom of such change. However, other courts still cling to the common law doctrine that the law recognizes but one Christian name.[13] Then again, a superfluous initial,[14] or the first and second[15] or second and third transposed,[16] prevents the creation of a lien.

As a rule an erroneous or faulty surname will not be countenanced[17] save where the doctrine of *idem sonans* is applied.[18] Other

[7] Stark v. Lamberton, 282 Pa. 219, 127 Atl. 631 (1925); Jones' Estate, 27 Pa. 336 (1856); Green v. Meyer, 98 Mo. App. 438, 72 S. W. 128 (1903); Stephenson v. Cone, 24 S. D. 460, 124 N. W. 439 (1910); Pinney v. Russell & Co., 52 Minn. 443, 54 N. W. 484 (1893).

[8] Huston v. Seeley, 27 Iowa 190 (1869); Hauser v. Calloway, 36 F. (2d) 667 (C. C. A. 8th, 1929).

[9] Johnson v. Wilson & Co., 37 Ala. 468, 34 So. 392 (1903); Prouty v. Marshall, 225 Pa. 570, 74 Atl. 550 (1909); Lemm v. Kramer, 224 S. W. 560 (Tex. Civ. App. 1920); Aultman v. Ward, 50 Neb. 442, 69 N. W. 935 (1897).

[10] Brayton v. Beall, 73 S. C. 308, 53 S. E. 641 (1906). *Contra:* Lemm v. Kramer, *supra* note 9; Windle v. Citizen's National Bank, 280 Mo. 268, 216 S. W. 1020 (1919).

[11] Dutton v. Simmons, 65 Me. 583 (1873); Allen West Commission Co. v. Millstead, 92 Miss. 837, 46 So. 256 (1908); Delaney v. Becker, 14 Pa. Super. Ct. 392 (1900); Turk v. Benson, 30 N. D. 200, 152 N. W. 354 (1915).

[12] Crouse v. Murphey, 140 Pa. 335, 21 Atl. 358 (1891); Woods v. Reynolds, 7 W. & S. 406 (Pa. 1844); Insurance Co. v. Halpern, 263 Pa. 155, 117 Atl. 197 (1922); Davis v. Steeps, 87 Wis. 472, 58 N. W. 769 (1894).

[13] Fincher v. Hanegan, 59 Ark. 151, 26 S. W. 821 (1894); Jones v. Berkshire, 15 Iowa 248 (1863); Butts v. Cruttenden, 14 Pa. Super. Ct. 449 (1900); Gillespie v. Rogers, 146 Mass. 612, 16 N. E. 711 (1888).

[14] Stone v. Threefoot Bros. & Co., 99 Miss. 15, 54 So. 595 (1911).

[15] Windle v. Citizen's National Bank, *supra* note 10. *Contra:* Huston v. Seeley, *supra* note 8 (J. A. is notice to one looking for Almira J.); Hauser v. Calloway, *supra* note 8 (Chester C. Calloway notice of lien against Charles Chester Calloway).

[16] Wicker v. Jenkins, 49 Tex. Civ. App. 366, 108 S. W. 188 (1900) (variance between W. F. B. Wicker and W. B. F. Wicker is fatal).

[17] Buchan v. Sumner, 2 Barb. Ch. 165 (N. Y. 1847) (judgment docketed as Sumner Palmer was not notice of Palmer Sumner); Lembeck & Betz Brewing Co. v. Barbi, 90 N. J. Eq. 373, 106 Atl. 552 (1919) (Barbi was not notice of Borbely, although signature on mortgage was Barbily and Bourbi); Mackey v. Cole, 79 Wis. 426, 48 N. W. 520 (1891); Howe v. Thayer, 49 Iowa 154 (1878) (Wm. H. Freeman does not create lien on Wm. H. Furman). *Contra:* Ouimert V. Sirous, *supra* note 2.

[18] Green v. Myers, *supra* note 7 (Seibert same as Sibert. "It is common knowledge that names are spelled a variety of ways and everyone is presumed to have such knowledge"). Myer v. Fegaly, 39 Pa. 429 (1861) (Bubb

courts, taking the more rational view, refuse to apply the rule[19] and hold that the record is notice to the eye and not to the ear. But where two names, though *idem sonans,* begin with different letters the inaccuracy is held by both sides to be material.[20]

Admittedly the majority of the courts, in the case of mortgages, permit some variance, but a variance on a judgment docket is generally fatal. Even in the case of mortgages the variance permitted is slight and often excused on the ground that the person is well known by both names,[21] or both are similar in a particular dialect.[22] Usually, however, the record is not to be construed in the light of extraneous matter.[23]

One is impressed by the almost total lack of cases dealing with corporate names imprecisely recorded. But in those found, the view taken is diametrically opposed to that of the principal case.[24]

In North Carolina, the court has taken a liberal attitude where the question of variance has arisen. When a variance occurs in the index,

and Bobb); Muehlenger v. Schilling, 3 N. Y. Supp. 705 (1888) (Schelleng and Schilling); Miltonvale State Bank v. Kuhnle, 50 Kan. 420, 31 Pac. 1057 (1893) (Johnston and Johnson); Howard v. Turbell, 179 Ind. 67, 100 N. E. 372 (1913) (Blunt and Blount); Bergman's Appeal, 88 Pa. 120 (1878) (Heckman and Hackman; eye is naturally directed to names slightly different); Bates v. State Bank, 7 Ark. 394 (1847) (Asher and Ashley).

[19] Berkowitz v. Dam, 202 N. Y. Supp. 584 (1923) (Sorcher and Soicher); Stark v. Weisner, *supra* note 2 (Weisner v. Wiesner); Aetna Life Insurance Co. v. Hesser, 77 Iowa 381, 42 N. W. 325 (1889) (Hesser and Hesse).

[20] Boyd v. Boyd, 128 Iowa 699, 104 N. W. 798 (1905) (Sheffey and Cheffey); Heil's Appeal, 40 Pa. 453 (1861) (Yoest and Joest); Clary v. O'Shea, 72 Minn. 105, 75 N. W. 115 (1898) (John O'Shea and John O. Shea). *Contra:* Fallon v. Kehoe, 38 Cal. 44 (1869) (Jeremiah Fallon and Darby O'Fallon).

[21] Brayton v. Beall, *supra* note 10; Ouimert v. Sirous, *supra* note 2; Fallon v. Kehoe, *supra* note 6; Jenny v. Zehnder, *supra* note 5; Huston v. Seeley, *supra* note 8; Hauser v. Calloway, *supra* note 8.

[22] Muehlenger v. Schilling, *supra* note 18 (both names have the same sound in German); Meyer v. Fegaly, *supra* note 18 (same sound in German; criterion is that the notice to be sufficient must advise a person of ordinary intelligence). *Contra:* Zimmer v. Dunlap, *supra* note 2 (Guiseppe, Italian for Joseph); Heil's Appeal, *supra* note 20 ("Law does not impose duty on the searcher to inquire whether other letters, in another language, may not spell the same name.").

[23] Grundies v. Reid, 107 Ill. 304 (1883) ("Constructive notice flowing exclusively from matters of record can never be construed to be more extensive or broader than the facts stated in the record."); Zimmerman v. Briggans, *supra* note 2 ("Subsequent creditors are not bound to go beyond the judgment docket."); Prouty v. Marshall, *supra* note 9; Thomas v. Desney, *supra* note 6; Boyd v. Boyd, *supra* note 20.

[24] McLarry v. Studebaker Bros. Co. of Texas, 146 S. W. 676 (Tex. Civ. App. 1912) (record of Studebaker Bros. of Texas is not notice of lien against Studebaker Bros.); Congregational Free Church Bldg. Society v. Scandinavian Free Church of Tacoma, 24 Wash. 433, 64 Pac. 750 (1901). (Scandinavian Congregational Church is not notice of Scandinavian Free Church); Spreyne v. Garfield Lodge No. 1, 117 Ill. App. 253 (1904).

a searcher is affected with all the knowledge that inquiry into the record would have revealed.[25]

The principal case seems to have gone too far. It proposes to reward the searcher in proportion to his ability to imply. And strangely enough, there is good authority in Illinois to the contrary.[26] In addition, the purpose of the recording statutes is to give constructive notice of a lien and not *prima facie* evidence of one. The likelihood of fraud and the insecurity which would arise under too liberal a view, is exactly what the statutes were passed to prevent. On its facts, it is believed that the instant case was correctly decided. Actually, no rights of a third party had intervened.

CECILE L. PILTZ.

Usury—Deduction of Expenses Incidental to the Loan.

In addition to the maximum legal rate of interest plaintiff building and loan association deducted two per cent from the loan to cover cost of investigating the borrower's credit. *Held,* not a scheme to evade the usury statutes, since there was no evidence to contradict the contention that the amount charged was actually expended in a bona fide way as compensation for the services rendered.[1]

It is generally conceded that deduction by the lender for expenses and services incidental to the loan does not render the transaction usurious even though the total amount received exceeds the legal interest rate.[2] This is true whether the expenses are already in-

[25] Royster v. Lane, 118 N. C. 156, 245 S. E. 796 (1896); Valentine v. Harrison, 193 N. C. 825, 138 S. E. 308 (1927); West v. Jackson, 198 N. C. 693, 153 S. E. 257 (1930) (the question is whether a careful searcher would be put upon inquiry).

[26] Grundies v. Reid, *supra* note 23; Kennedy v. Merriam, 70 Ill. 228 (1873); Garrison v. People, 21 Ill. 535 (1859); Spreyne v. Garfield Lodge No. 1, *supra* note 24 (charter granted to United Slavonian Benevolent Society does not tend to prove the corporate existence of Garfield Lodge No. 1 of United Slavonian Benevolent Society).

[1] Taylor v. Consolidated Loan and Savings Co., 162 S. E. 391 (Ga. App. 1932).

[2] Iowa Savings and Loan Association v. Heidt, 107 Iowa 297, 77 N. W. 1050, 70 Am. St. Rep. 197, 43 L. R. A. 689 (1899) (expenses incurred by lender in recording the mortgage, procuring the abstract, and examining the title); Ashland National Bank v. Conley, 231 Ky. 844, 22 S. W. (2d) 270 (1929) (examining title, procuring insurance, and appraising property). Note (1921) 21 A. L. R. 797; Note (1927) 53 A. L. R. 743; Note (1928) 63 A. L. R. 823. Deduction of expenses incidental to the loan has statutory recognition in North Carolina as to building and loan associations and land and loan associations. Building and loan: N. C. CODE ANN. (Michie, 1931) §5183; land and loan: N. C. CODE ANN. (Michie, 1931) §5207 (h). There seems to be no such provision for savings and loan associations.

curred[3] or are anticipated.[4] But such charges must not be unreasonable or excessive.[5] They must be for services actually rendered and may not be employed as a mere device to evade the usury statutes.[6] The question seems ultimately to be one of *bona fides*,[7] since intent is an essential element of an usurious transaction.[8] It is generally held that the intent must exist in both parties,[9] but there is good authority to the contrary.[10]

As to what constitutes a valid incidental charge, it is held that a loan is not rendered usurious by the payment of a commission to the

[3] Brown v. Robinson, 224 N. Y. 301, 120 N. E. 694 (1918) (expenses incurred in obtaining insurance for borrower on contingent interests); Matthews v. Georgia State Savings Association, 132 Ark. 219, 200 S. W. 130, 21 A. L. R. 789 (1918) (attorney's fee for examining title and travelling expenses); Blanchard v. Hoffman, 154 Minn. 525, 192 N. W. 352 (1923) (services rendered in managing property and removing encumbrances therefrom). And see Stewart v. G. L. Miller & Co., 161 Ga. 919, 132 S. E. 535 (1926). (Underwriting agreement with provision for supervision of building construction, etc.).

[4] Comstock v. Wilder, 61 Iowa 274, 16 N. W. 108 (1883) (examination of property); Daley v. Minnesota Loan and Investment Co., 43 Minn. 517, 45 N. W. 1100 (1890) (preparation of papers, examination of abstract, and investigation of property); Fisher v. Adamson, 47 Utah 3, 151 Pac. 351 (1915) (looking up securities).

[5] Mayfield v. British and American Mortgage Co., 104 S. C. 152, 88 S. E. 370 (1916) (preparing abstract of title); Cooper v. Ross, 232 Mich. 548, 205 N. W. 592 (1925) (bonus charge); London Realty Co. v. Riordan, 207 N. Y. 264, 100 N. E. 800, Ann. Cas. 1914C 408 (1913) (charge of ten dollars on a loan of sixty-five dollars).

[6] Haines v. Commercial Mortgage Co., 200 Cal. 609, 254 Pac. 956, 53 A. L. R. 725 (1927) (broker's fee of three percent which could not be allocated to any particular item for which the lender could legitimately charge); Horkan v. Nesbitt, 58 Minn. 487, 60 N. W. 132 (1894) (pretended services in drafting papers and examining property); Sanders v. Nicolson, 101 Ga. 739, 28 S. E. 976 (1897) (supposed "professional services"); Rowland v. Building and Loan Association, 116 N. C. 878, 22 S. E. 8 (1895) ("dues," "fines," and "fees"); Hollowell v. Building and Loan Association, 120 N. C. 286, 26 S. E. 781 (1897) ("dues," "fines," and "charges"); Pugh v. Scarboro, 200 N. C. 59, 156 S. E. 149 (1930) (bonus); Detweiler v. Foreman, 120 Neb. 780, 235 N. W. 330 (1931) (commission); Babcock v. Olhasso, 109 Cal. App. 534, 293 Pac. 141 (1930) (bonus).

[7] Weaver Hardware Co. v. Solomovitz, 98 Misc. Rep. 413, 163 N. Y. Supp. 121 (1917).

[8] Flax v. Mutual Building and Loan Association, 198 Mich. 676, 165 N. W. 835 (1917); Irby v. Commercial National Bank, 208 Ala. 617, 95 So. 28 (1923); Equitable Trust Co. v. Lumber Co., 41 F. (2d) 60 (N. D. Idaho 1930). Intent will be inferred from a written instrument. MacRakan v. Bank, 164 N. C. 24, 80 S. E. 184 (1913). But intent to take an usurious amount without actually doing so cannot be usury. Low v. Sutherlin, Barry & Co., Inc., 35 F. (2d) 443 (C. C. A. 9th, 1929).

[9] Continental Savings and Building Association v. Wood, 33 S. W. (2d) 770 (Tex. Civ. App. 1930); Brown v. Robinson, *supra* note 3; Salvin v. Myles Realty Co., 227 N. Y. 51, 124 N. E. 94, 6 A. L. R. 581 (1919).

[10] Elba Bank and Trust Co. v. Davis, 212 Ala. 176, 102 So. 117 (1924); First National Bank v. Phares, 70 Okla. 255, 174 Pac. 519, 21 A. L. R. 793 (1918).

borrower's agent[11] or to an individual broker.[12] The same applies to the lender's agent if the lender has no knowledge of or interest in the commission.[13] Courts do not agree where the lender does have such knowledge,[14] or where the interest in the commission does not form a part of the consideration for the loan.[15] Bona fide charges for services actually rendered in examining and appraising the security offered for the loan are held valid,[16] as are like charges for travelling expenses incurred in connection therewith,[17] procuring the money for the loan,[18] investigation of the property,[19] examination of the bor-

[11] Richardson v. Shattuck, 57 Ark. 347, 21 S. W. 478 (1893); Webb v. Southern Trust Co., 227 Ky. 70, 11 S. W. (2d) 988 (1928). It seems that the North Carolina Court holds even this usurious if the lender had knowledge of the commission charged. Nance v. Welborne, 195 N. C. 459, 142 S. E. 477 (1928); Patterson v. Blomberg, 196 N. C. 433, 146 S. E. 66 (1929).

[12] Hatcher v. Union Trust Co., 174 Minn. 241, 219 N. W. 76 (1928); Union Central Life Insurance Co. v. Edwards, 219 Ky. 748, 294 S. W. 502 (1927).

[13] Friedman v. Katz, 246 Mich. 296, 224 N. W. 325 (1929); Gantzer v. Schmeltz, 206 Ill. 560, 69 N. E. 584 (1904); Brigham v. Myers, 51 Iowa 397, 1 N. W. 613, 33 Am. Rep. 140 (1879). But Nebraska and a few other jurisdictions take a strict view and hold that such a charge renders the loan usurious whether the lender had any knowledge of the commission or not, on the ground that the principal is bound by the acts of his agent. Hare v. Winterer, 64 Neb. 555, 90 N. W. 544 (1902); Joslin v. Miller, 14 Neb. 91, 15 N. W. 214 (1883); Condit v. Baldwin, 21 N. Y. 219, 78 Am. Dec. 137 (1860); Robinson v. Blaker, 85 Minn. 242, 88 N. W. 845, 89 Am. St. Rep. 541 (1902); Dalton v. Weber, 203 Mich. 455, 169 N. W. 946 (1918). Citizens' Bank v. Heyward, 135 S. C. 190, 133 S. E. 709 (1925) (agreement of borrower to pay 8% interest and additional 2% to president of bank).

[14] The question here seems to be whether such knowledge amounts to an authorization or ratification of the commission. That question is determined in the affirmative where there is an understanding between the lender and the agent that the latter shall get his compensation from the borrower. Clark v. Havard, 111 Ga. 242, 36 S. E. 837, 51 A. L. R. 499 (1900); Texas Loan Agency v. Hunter, 13 Tex. Civ. App. 402, 36 S. W. 399 (1896); Brown v. Johnson, 43 Utah 1, 134 Pac. 590, 46 L. R. A. (N. S.) 1157, Ann. Cas. 1916C 321 (1913). The same is true where the agent shares the commission with the lender. Williams v. Rich, 117 N. C. 235, 23 S. E. 257 (1895); Umphrey v. Auyer, 208 Mich. 276, 175 N. W. 226 (1919). See (1928) 7 N. C. L. REV. 332 for a discussion as to the effect of sharing the commission with the lender.

[15] Eslava v. Crampton, 61 Ala. 507 (1878); Wilhoit v. Flack, 123 Ark. 619, 185 S. W. 460 (1916); Grieser v. Hall, 56 Minn. 155, 57 N. W. 462 (1894).

[16] Ashland National Bank v. Conley, *supra* note 2; Daley v. Minnesota Loan and Investment Co., *supra* note 4; (1930) 18 KY. L. J. 401.

[17] Smith v. Wolf, 55 Iowa 555, 8 N. W. 429 (1881); Matthews v. Georgia State Savings Association, *supra* note 3.

[18] Riker v. Clark, 54 Vt. 289 (1881) (expense incurred from payment of interest by the lender on a loan from a third person); Stevens v. Staples, 64 Minn. 3, 65 N. W. 959 (1896) (loss incurred by lender in changing his investments in order to secure a loan from a third person).

[19] Comstock v. Wilder, 61 Ia. 274, 16 N. W. 108 (1883); Liskey v. Snyder, 56 W. Va. 610, 49 S. E. 515 (1904).

rower's title,[20] removal of encumbrances from the security offered,[21] recordation of the mortgage,[22] exchange,[23] attorney's fee for collection, [24] preparation of papers,[25] and obtaining of contracts, such as insurance, which are made a condition precedent to the loan.[26] A provision that the borrower pay the taxes on the land is upheld,[27] but courts are inclined to disagree as to taxes on the mortgage or the debt.[28]

The abuse of the service charge has in some instances occasioned legislative action, notably in the field of the small loan. Thus, many states, including the jurisdiction of the principal case,[29] have enacted the Uniform Small Loan Law,[30] providing for a fair return to one

[20] Matthews v. Georgia State Savings Association, *supra* note 3; Iowa Savings and Loan Association v. Heidt, *supra* note 2.

[21] Testera v. Richardson, 77 Wash. 377, 137 Pac. 998 (1914); Wacasie v. Radford, 142 Ga. 113, 82 S. E. 442 (1914).

[22] Iowa Savings and Loan Association v. Heidt, *supra* note 2; Domboorajian v. Woodruff, 239 Mich. 1, 214 N. W. 113 (1927); Gault v. Thurmond, 39 Okla. 673, 136 Pac. 742 (1913).

[23] Tipton v. Ellsworth, 18 Idaho 207, 109 Pac. 134 (1910); Smith v. Champion, 102 Ga. 92, 29 S. E. 166 (1897).

[24] Morris Plan Bank v. Whitman, 150 Atl. 610 (R. I. 1930).

[25] Daley v. Minnesota Loan and Investment Co., *supra* note 4; Pivot City Realty Co. v. State Savings and Trust Co., 162 N. E. 27 (Ind. App. 1928); Mayfield v. British American Mortgage Co., *supra* note 5.

[26] Brown v. Robinson, *supra* note 3; Hance Hardware Co. v. Denbigh Hall, Inc., 152 Atl. 130 (Del. Ch. 1930).

[27] Kidder v. Vandersloot, 114 Ill. 133, 28 N. E. 460 (1885); Detroit v. Board of Assessors, 91 Mich. 78, 51 N. W. 787, 16 L. R. A. 59 (1892). *Contra:* Dawson County State Bank v. Temple, 116 Neb. 727, 218 N. W. 737 (1928). Some cases draw the distinction as to who has the legal title. Union Mortgage Bank and Trust Co. v. Hagood, 97 Fed. 360 (C. C. D. S. C. 1897); Dwyer v. Weyant, 116 Neb. 485, 218 N. W. 140 (1928); (1926) 5 NEB. L. B. 431; (1928) 41 HARV. L. REV. 405.

[28] Held usurious: Vandervelde v. Wilson, 176 Mich. 185, 142 N. W. 553 (1913); Meem v. Dulaney, 88 Va. 674, 14 S. E. 363 (1890). Held not usurious: Lassman v. Jacobson, 125 Minn. 218, 146 N. W. 350, 51 L. R. A. (N. S.) 465, Ann. Cas. 1915C 774 (1914); Moore v. Lindsey, 61 Misc. 176, 114 N. Y. Supp. 684 (1908).

[29] GA. CODE ANN. (Michie, 1926) §§1170 (61) *et seq.* The court in the principal case held the statute inapplicable, probably because of the amount of the loan, though such does not appear.

[30] Under this law the lender of $300 or less must have a license from the state, for which he posts bond. He is allowed to charge 3½% per month. ARIZ. REV. CODE (1928) §§1989 *et seq;* CONN. GEN. STAT. (1930) §§4066 *et seq;* ILL. STAT. ANN. (Callaghan, 1924) Ch. 74 §§27 *et seq;* IND. ANN. STAT. (Burns, 1926) §§9777 *et seq;* IOWA CODE (1931) §§9410 *et seq;* MD. CODE ANN. (Bagby, 1924) Art. 58A; PA. STAT. (West, 1920) §§14099 *et seq;* VA. CODE ANN. (Michie, 1930) §§4168 *et seq;* GA. CODE ANN. (Michie, 1926) §§1770 (61) *et seq;* W. VA. CODE (1931) Art 7, §§1 *et seq.* Tennessee's similar "loan shark law" allows service charges. TENN. CODE (1932) §§6721 *et seq.* Ohio's pawnbroker's law confines service charges to storage and allows 3½% monthly for this. OHIO CODE ANN. (Throckmorton, 1929) §6339-3. In connection with these statutes it is interesting to take note of the well known Household Finance

who lends three hundred dollars or less without the necessity of resorting to the subterfuge of service charges, which are allowed under no pretext. Along the same line, but applying to any size of loan, except as limited by the amount of the bank's capital stock, Michigan's Revised Banking Code of 1929[31] includes a provision allowing a service charge on a graduated scale according to the amount of the loan. The only substantial difference between the two laws lies in the method employed of reaching the same desired result. The small loan law allocates a fixed percentage to the loan by way of interest. The Michigan law allocates a variable amount to the loan by way of service charges. Both are to be commended as fairly successful restrictive legislation.

FRANK P. SPRUILL, JR.

Workmen's Compensation—Disability Resulting from Combination of Accident and Disease.

Plaintiff appeals from the decision of the Compensation Commissioner, which denied him an award for arthritis causing disability one month after he suffered a severe injury when a loaded coal car, in the mine in which he was working, fell on him. On the undisputed facts the court reversed the Commissioner's order, granting plaintiff all reasonable inferences in his favor.[1]

The right to appeal from a decision of the Industrial Commission is for the most part regulated by statute. But it has been generally

Corporation, incorporated in Delaware in 1925, and engaging in the business of small loans secured by chattel mortgages in states which have enacted the Uniform Small Loan Law or similar legislation legalizing this business. It has approximately 150 offices, including Household Finance Corporation of New York, Household Finance Corporation of America (Del.), and Small Loans Corporation of Illinois, wholly owned subsidiaries. MOODY'S MANUAL, BANKS AND FINANCE (1931) 1398. As of March 31, 1932 it had resources of $49,118,-187. MOODY'S MANUAL, BANKS AND FINANCE, Advance Parts (1932) 1481. For a review of the Uniform Small Loan law see Note (1923) 23 COL. L. REV. 484.

[31] " . . . the bank shall have power to charge for a loan made pursuant to this section one dollar for each fifty dollars or fraction thereof loaned for expenses, including any examination or investigation of the character and circumstances of the borrower, co-maker, or surety and for drawing and taking acknowledgement of necessary papers or other expenses incurred in making the loan; no charge shall be collected unless a loan shall have been made and in no case shall such charge exceed fifteen dollars." MICH. COMP. LAWS (1929) §11927.

[1] Goble v. State Compensation Commissioner, 162 S. E. 314 (W. Va. 1932).

held,[2] with North Carolina in accord,[3] that only questions of law are reviewable by the courts on appeal, while the findings of fact of the Commission, where supported by competent evidence, are conclusive and binding on the courts. However, in determining whether such findings do support the order or award, the courts are given an opportunity to dispute the conclusion reached by the Commission.

The North Carolina Workmen's Compensation Act expressly provides in §2 (F)[4]: "Injury and personal injury shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except where it results naturally and unavoidably[5] from the accident." The position of North Carolina in regard to this problem appears to resolve itself into the fact question as to whether the plaintiff succeeds, in the absence of direct positive proof, in establishing causal connection between the injury and the disease. Where the essential link is, by scientific and medical authority, shown to exist between the injury and the disease, compensation is allowed.[6] Where the plaintiff fails to prove that his

[2] Milwaukee v. Industrial Commission, 160 Wis. 238, 151 N. W. 247 (1915); Stephenson v. Industrial Commission, 79 Okla. 228, 192 Pac. 580 (1920); Golden's Case, 240 Mass. 178, 132 N. E. 726 (1921); Driscoll v. McAlister Bros., 294 Pa. 169, 144 Atl. 89 (1928); Neglia v. Zimmerman, 237 N. Y. 131, 142 N. E. 442 (1923).

[3] N. C. CODE ANN. (Michie, 1931) §8081 (ppp) (findings of fact conclusive —errors of law subject to review); Chambers v. Union Oil Co., 199 N. C. 28, 153 S. E. 594 (1930); Bellamy v. Great Falls Mfg. Co., 200 N. C. 676, 158 S. E. 246 (1931) (plaintiff entitled to benefit of every reasonable intendment on the evidence, and every reasonable inference to be drawn therefrom); *In re* Hayes, 200 N. C. 133, 156 S. E. 791, 73 A. L. R. 1179 (1931); Southern v. Cotton Mills Co., 200 N. C. 165, 156 S. E. 861 (1931); Williams v. Thompson, 200 N. C. 463, 157 S. E. 430 (1931) (findings of fact conclusive on appeal where there is competent evidence to sustain the award); Parrish v. Armour Co., 200 N. C. 654, 158 S. E. 188 (1931); West v. Fertilizer Co., 201 N. C. 556, 160 S. E. 171 (1931); Brooks v. Clement Co., 201 N. C. 768 (1931); Cabe v. Parker-Graham-Sexton, Inc., 202 N. C. 176, 162 S. E. 223 (1932); Poole v. Sigmon, 202 N. C. 172, 162 S. E. 198 (1932) (court on appeal has jurisdiction to review all evidence for purpose of determining whether as matter of law there was any evidence tending to support finding of Commission); Aycock v. Cooper, 202 N. C. 500 (1932).

[4] N. C. CODE ANN. (Michie, 1931) §8081 (F.).

[5] One of the earliest cases construed an unavoidable disease to mean a condition where common prudence and foresight cannot prevent it. Williams v. Thompson, 1 N. C. I. C. 124, 200 N. C. 463, 157 S. E. 430 (1931).

[6] Lumsden v. Orrell, 1 N. C. I. C. 376 (1930) (accidental injury developed into nephritis which affected organs); Thompson v. Clement Co., 1 N. C. I. C. 441 (1930) (injury resulted in paralysis, though developed several months later); Edgerton v. Lake Lure Lumber Co., 1 N. C. I. C. 429 (1930) (inflammation of intestines resulting from nervous condition caused by muscle strain); Burns v. Rockwell Casket Co., 1 N. C. I. C. 457 (1930) (accident resulting in brain injury and impediment to speech); Sides v. Dover Mill Co., 1 N. C. I. C. 489 (1930) (kidney stone discovered after injury); Williams v. Thompson, 1 N. C. I. C. 124, 200 N. C. 463, 157 S. E. 430 (1931) (eye infection following injury).

disease follows as a consequence of the accidental injury, compensation is denied.[7] No award is granted in cases of occupational disease,[8] nor in fact for any illness, though contracted in the course of employment, if there is not in addition a specific accident.[9]

The same general principles apply in cases of disease existing prior to the accident. The rule is well established that the pre-existing physical condition will not bar the rights of compensation if the disability is proximately caused by an accident arising in the course of employment.[10] It has been stated that "the employer takes the em-

[7] Wilkins v. Elliott Building Co., 1 N. C. I. C. 90 (1929) (ulcers of stomach not proven by clear and satisfactory evidence to be result of accident during employment); Hepler v. Forsyth Furniture Lines, 1 N. C. I. C. 309 (1930) (death due to apoplexy not connected with fall shortly prior thereto); Brady v. Teer, 1 N. C. I. C. 353 (1930) (lobar pneumonia and pyelitis not result from strained back); Howell v. Rocky Mount, 1 N. C. I. C. 373 (1930) (Bright's Disease not connected with injury); Jackson v. American Enka Corporation, 1 N. C. I. C. 412 (1930) (connection not shown between injury and misplacement of organs); Haney v. Hans Rees' Sons, 2 N. C. I. C. 67 (1930) (Epididymitis not result of strain); Hamby v. Teague, 2 N. C. I. C. 68 (1930) (pneumonia not result of accident); Hart v. Majestic Mfg. Co., 2 N. C. I. C. 83 (1930) (nephritis not result of injury); Williams v. Highland Park Mfg. Co., 2 N. C. I. C. 89 (1930) (paralysis not result of injury); Clayton v. Paperboard Co., 3 N. C. I. C. 27 (1931) (septic meningitis, according to medical testimony, unrelated to injury described); Conder v. News Publishing Co., 3 N. C. I. C. 28 (1931) (death caused by rheumatic fever and not accidental injury); Sanders v. Henrietta Mills, 3 N. C. I. C. 38 (1931) (rheumatism not resulting from accident).

[8] McLean v. Michael, 1 N. C. I. C. 275 (1930); Nance v. Tomlinson Chair Co., 1 N. C. I. C. 276 (1930); Dyer v. Wood Products Co., 1 N. C. I. C. 435 (1930); Cabe v. Parker-Graham-Secton, Inc., 2 N. C. I. C. 135, 202 N. C. 176 (1932).

[9] Stuart v. Rainey Hospital, 2 N. C. I. C. 125 (1931) (nurse denied compensation for smallpox contracted while handling a mattress used by a patient of hospital where she was employed); Burleyson v. Cannon Mills Co., 1 N. C. I. C. 201 (1930); Lawter v. Henrietta Mills, 1 N. C. I. C. 250 (1930); Stegall v. Wade Mfg. Co., 1 N. C. I. C. 313 (1930) (osteo-arthritis, but failed to establish fact of accident); Setzer v. Caldwell Motor Co., 2 N. C. I. C. 5 (1930); Lovingood v. Fontana Mining Corporation, 2 N. C. I. C. 55 (1930) (chronic arthritis not injury); Becker v. Acme Mfg. Co., 2 N. C. I. C. 59 (1930); Shadrack v. Sanders Motor Co., 2 N. C. I. C. 355 (1931); Hemmingway v. Plywood Corporation, 2 N. C. I. C. 269 (1931) (pneumonia resulting from exposure to extreme heat and then cooling off considered not result of specific accident to merit compensation).

[10] Note (1929) 60 A. L. R. 1300; 2 ROCKY MOUNTAIN L. REV. 68 (1930); Hartz v. Hartford Faience Co., 90 Conn. 539, 97 Atl. 1020 (1916); Sanitary Dist. of Chicago v. Industrial Commission, 343 Ill. 236, 175 N. E. 372 (1931); Western Electric Co. v. Industrial Commission of Illinois, 285 Ill. 279, 120 N. E. 774 (1918); Rockford City Traction Co. v. Industrial Commission, 295 Ill. 358, 139 N. E. 135 (1920); Sulzberger & Sons Co. v. Industrial Commission of Illinois, 285 Ill. 223, 120 N. E. 535 (1918); *In re* Bowers, *In re* Williams, *In re* Colan, 65 Ind. App. 128, 116 N. E. 842 (1917); Cambridge Mfg. Co. v. Johnson, 153 Atl. 283 (Md. 1931); Glennon's Case, 236 Mass. 542, 128 N. E. 942 (1920); *In re* Madden, 222 Mass. 487, 111 N. E. 379 (1916); *In re* Brightman, 220 Mass. 17, 107 N. E. 527 (1914); Van Keuren v. Dwight Divine and

ployee as he finds him, and if the accident accelerates or aggravates a pre-existing diseased condition the injured party is entitled to compensation, while, on the other hand, an injury due to the natural progress of the disease itself will not warrant a finding that the injuries were due to an accident."[11] North Carolina's first decision on the question interprets the true intent and meaning of the statute to apply "where, by reason of an accident, either a disease is caused or accelerated or intensified thereby, the employee is entitled to be compensated according to the provisions of the Act."[12] Because of the factual difficulty in determining the exact starting point of a disease, as in the present case, it becomes important to notice that the law applies alike in awarding compensation for disabilities wherein disease plays a part, whether causation or aggravation, if, and only if, it is evident that such causation or aggravation may be traced directly to accidental injury during the course of employment. So much depends on the expert testimony of each case that the law can do little more than lay down general principles, relying on the knowledge and skill of the medical profession in fitting these principles to specific disabilities. Accordingly, numerous cases of arthritis have been judged compensable whether caused or aggravated by an accidental injury.[13]

REEME MOORE.

Sons, 165 N. Y. Supp. 1049 (1917); Finkelday v. Henry Heide, Inc., 183 N. Y. Supp. 912 (1920); Carroll v. What Cheer Stables Co., 38 R. I. 421, 96 Atl. 208 (1916); Ballard v. Cannon Mills, 1 N. C. I. C. 107 (1929) (slight ankle injury aggravated and accelerated pre-existing syphilitic condition); Blackwell v. Winston-Salem Chair Co., 1 N. C. I. C. 163 (1930) (preexisting myocarditis not compensable since not aggravated by injury); Ward v. Cape Fear Hotel Corporation, 2 N. C. I. C. 51 (1930) (compensation granted for aggravation of diabetes caused by bruised foot and gangrene); Duncan v. St. Paul's Mills, 2 N. C. I. C. 156 (1931) (chronic rheumatic carditis accelerated by injury entitled to compensation).

[11] 1 SCHNEIDER, WORKMAN'S COMPENSATION LAW (2d ed. 1932) 952.

[12] Ballard v. Cannon Mills, 1 N. C. I. C. 107, 112 (1929).

[13] Perry Coal Co. v. Industrial Commission, 332 Ill. 328, 163 N. E. 681 (1928); Consolidated Coal Co. v. Industrial Commission, 311 Ill. 59, 142 N. E. 498 (1924); Sunnyside Mining Co. v. Industrial Commission, 320 Ill. 488, 151 N. E. 238 (1926); Blackman v. Hope Engineering & Supply Co., 11 La. App. 92, 120 So. 682 (1929) (facts practically identical with principal case); Hamilton v. Pennsylvania Railroad Co., 298 Pa. 22, 147 Atl. 837 (1929).

Otherwise where the disease is unaffected by the injury. Rosenkranz v. Industrial Commission of Colorado, 83 Colo. 123, 262 Pac. 1014 (1927); Maryland Casualty Co. v. Industrial Commission of Utah, 74 Utah 170, 278 Pac. 60 (1929); Powell v. Ohio Oil Co., 13 La. App. 24, 127 So. 30 (1930); Antley v. La. Central Lumber Co., 11 La. App. 14, 122 So. 78 (1929); Jacksonville & H. R. Co. v. Industrial Commission, 336 Ill. 350, 168 N. E. 302 (1929).